

2017

# Government Property Law Review

Options Paper Recommendations  
*Body corporate governance issues:  
By-laws, debt recovery and scheme  
termination*

Commercial and Property Law  
Research Centre  
QUT Law

## Preface

The Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology (**QUT**) was established in 2013. The Centre is a specialist network of researchers with a vision of reforming legal and regulatory frameworks in the commercial and property law sector through high impact applied research.

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# 1. Body corporate governance – Recommendations

## 1.1. Introduction

The primary object of the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**) is to provide for flexible and contemporary communally based arrangements for the use of freehold land having regard to the secondary objects which include (among others):

- to balance the rights of individuals with the responsibility for self-management as an inherent aspect of community titles schemes;
- to promote economic development by establishing sufficiently flexible administrative and management arrangements for community titles schemes;
- to ensure bodies corporate for community titles schemes have control of the common property and body corporate assets they are responsible for managing on behalf of owners of lots included in the scheme; and
- to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes.<sup>1</sup>

The primary and secondary objects are achieved through legislative provisions that cover a diverse range of areas from governing the basic operation and management of community titles schemes through to administrative matters, the sale of lots and dispute resolution.

The BCCM Act applies to more than 46,300 community titles schemes in Queensland.<sup>2</sup>

## 1.2. The Options Paper

In August 2013, the Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology (**QUT**) commenced a review of Queensland property law<sup>3</sup> including issues arising under the BCCM Act.

In December 2014, an options paper titled *Body corporate governance issues: By-laws, debt recovery and scheme termination* (**Options Paper**)<sup>4</sup> was released for public submission by the Department of Justice and Attorney-General.

The Options Paper addressed important aspects of living in community titles schemes. The first topic considered in the Options Paper was the enforceability of by-laws, including the types of by-laws that can be enforced and the mechanism for enforcing them. The issues of parking, pets, smoking and overcrowding were used to demonstrate ways in which the current enforcement mechanism may be improved to better deal with concerns of an immediate nature.

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<sup>1</sup> *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**) ss 2-4.

<sup>2</sup> Queensland Registrar of Titles: Information provided by the Office of the Registrar of Titles, Department of Natural Resources and Mines, Queensland as at 31 December 2016.

<sup>3</sup> See Ministerial Media Release, *Review modernises Queensland Property Law*, then Attorney-General and Minister for Justice the Honourable Jarrod Bleijie, 15 August 2013.

<sup>4</sup> Commercial and Property Law Research Centre, *Body corporate governance issues: By-laws, debt recovery and scheme termination* (**Options Paper**), released by Department of Justice and Attorney-General, available at <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-property-law-in-queensland>.

The second topic considered in the Options Paper was the debt recovery mechanisms that the body corporate may employ to collect unpaid body corporate contributions from a lot owner. A number of questions were asked in relation to ways to improve the debt recovery mechanism for bodies corporate.

Finally, the Options Paper addressed the contentious issue of scheme termination to ask whether the existing provisions are sufficient and to suggest potential options for reform.

The Options Paper put forward a total of 29 questions for public submission. Following significant press coverage (particularly in relation to the issue of allowing bodies corporate to ban smoking on a lot where that smoke could drift to another lot)<sup>5</sup> the Options Paper received over 320 submissions.

### 1.3. The submissions

Submissions to the Options Paper were received from a wide range of strata industry stakeholders including lot owners, bodies corporate, strata managers, solicitors and peak bodies representing a wide variety of interests.

A total of 321 submissions were received. However, not all submissions addressed all questions. The highest number of responses were received in relation to the question about whether the body corporate should have the ability to ban smoking on a lot. This question was addressed by 261 submissions. The lowest number of responses was received on the question relating to termination of schemes which received only 48 responses.

The questions relating to by-law enforceability attracted submissions from the Cancer Council, British American Tobacco and the Royal Society for the Prevention of Cruelty to Animals (**RSPCA**).

Submissions were received from several key stakeholder groups in the strata industry, including:

- the Strata Community Australia (Queensland) (**SCA**) which represents body corporate managers;
- the Australian Resident Accommodation Managers Association (**ARAMA**) which represents resident unit managers (also referred to as caretakers);
- the Owners Corporation Network (Qld) (**OCN**) which represents lot owners; and
- the Unit Owners Association of Queensland (**UOAQ**) which also represents lot owners.

In addition, the SCA, ARAMA and the OCN made a joint submission expressing in principle agreement in relation to a large number of the questions raised in the Options Paper. Other bodies that made submissions to the Options Paper include:

- the Urban Development Institute of Australia (Queensland) (**UDIA**);
- the Property Council of Australia (Queensland) (**PCA**);
- the Real Estate Institute of Queensland (**REIQ**); and
- the Queensland Law Society (**QLS**).

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<sup>5</sup> Rose Brennan, 'Smokers may be locked indoors', *The Courier Mail* (Brisbane) 13 January 2015. This article was picked up by major news outlets in Australia and around the world.

## 1.4. The Recommendations

NUMBER	RECOMMENDATION
<b>BY-LAW ENFORCEMENT</b>	
<b>1</b>	<b>Towing for breach of parking by-laws</b>
	<p>Where a body corporate has adopted appropriate by-laws and erected appropriate signage on the common property, that body corporate should have the express ability to engage a licensed tow truck operator to remove a vehicle parked without the body corporate's consent from the common property:</p> <ul style="list-style-type: none"> <li>• at a reasonable time after sufficient notice in the prescribed form has been given in non-urgent circumstances; and</li> <li>• immediately and without notice when the vehicle is parked in a way that blocks ingress and egress to a lot, the scheme land, fire doors or other critical infrastructure (<b>urgent circumstances</b>).</li> </ul>
<b>2</b>	<b>Delegating the decision to tow in urgent circumstances</b>
	<p>Where a body corporate has adopted appropriate by-laws and erected appropriate signage on the common property, that body corporate should be able to delegate decision making authority to:</p> <ul style="list-style-type: none"> <li>• a body corporate manager or a resident manager under a service contract; or</li> <li>• a specified committee member who lives on site,</li> </ul> <p>to decide whether a vehicle is parked on the common property in urgent circumstances, and where urgent circumstances exist, to arrange for the vehicle to be towed from the common property by a licensed tow truck operator.</p> <p>Where the body corporate decides to delegate this power, the delegation to a body corporate manager or resident manager will be performed under a service contract with the body corporate. If the delegation is to a committee member who lives on site, that delegation will be authorised by a resolution of the body corporate (and not performed under a service contract). The body corporate will remain liable for any loss or damage to the owner or person in control of the towed vehicle and must indemnify the delegate appropriately.</p> <p>For the avoidance of doubt, implementation of this recommendation will require an exception to the general prohibition on delegation of power by the body corporate.</p>
<b>3</b>	<b>Lot owner / occupier's right to tow</b>
	<p>The right of a lot owner or occupier to remove a vehicle parked without permission on their lot or in an exclusive use common area allocated to their lot is outside the scope of the BCCM Act.</p>

NUMBER	RECOMMENDATION
4	<p align="center"><b>Liability for improper towing</b></p>
	<p>If the body corporate has adopted appropriate by-laws, posted appropriate signage on the common property and towed a vehicle (either as a result of a body corporate decision or a decision by a delegate) following the proper procedure as set out in the legislation, the body corporate will not be liable to the owner or person in control of the vehicle for any loss or damage to the vehicle or any amounts associated with the towing and storage of the vehicle.</p> <p>A duly authorised service contractor or a committee member acting under a delegation from the body corporate to tow vehicles in urgent circumstances will be acting as an agent of the body corporate when towing vehicles in urgent circumstances.</p> <p>The onus of proof that the vehicle has been towed in accordance with the proper procedure should at all times remain with the body corporate.</p> <p>A dispute as to whether the body corporate (or its delegate) has exercised the proper procedure when towing a vehicle must be heard in the appropriate forum.</p>
5	<p align="center"><b>Pets</b></p>
	<p>A by-law prohibiting the keeping of pets in a lot or on the common property should be enforceable against lot owners and occupiers if:</p> <ul style="list-style-type: none"> <li>the original owner includes the by-law in the schedule of by-laws attached to the first community management statement (<b>CMS</b>) for the scheme; or</li> <li>the body corporate adopts the by-law by a resolution without dissent.</li> </ul> <p>Aside from this different threshold required to adopt the by-law, a no pets by-law will be added to the CMS and enforceable in the same way as any other by-law for the scheme. Amending or removing a no pets by-law will also require a resolution without dissent.</p> <p>For the removal of doubt, the adoption of this recommendation will require a change to the power of the body corporate to regulate activity so that a prohibition on keeping pets is permissible and not unreasonable or oppressive.</p> <p>A no pets by-law will not operate retrospectively.</p>
6	<p align="center"><b>Smoking</b></p>
	<p>A by-law prohibiting smoking in an outdoor area that is part of a lot (including balconies, courtyards, etc) or on common property (including common property subject to an exclusive use by-law) should be enforceable against lot owners and occupiers if:</p> <ul style="list-style-type: none"> <li>the original owner includes the by-law in the schedule of by-laws attached to the first CMS for the scheme; or</li> <li>the body corporate adopts the by-law by a resolution without dissent.</li> </ul> <p>Aside from this different threshold required to adopt the by-law, a no smoking by-law will be added to the CMS and enforceable in the same way as any other by-law for the scheme. Amending or removing a no smoking by-law will also require a resolution without dissent.</p> <p>For the removal of doubt, the adoption of this recommendation will require a change to the power of the body corporate to regulate activity so that prohibition on smoking in an outdoor area that is part of a lot or on common property where that smoke drifts to an adjacent lot is permissible and not unreasonable or oppressive.</p>

NUMBER	RECOMMENDATION
7	<b>Overcrowding</b>
	<p>Where overcrowding of a lot is suspected on reasonable grounds, the body corporate should have the authority to report the matter to the local council or the fire service (a <b>relevant authority</b>).</p> <p>If the relevant authority is unable to obtain consent from the lot occupier to enter the lot to investigate the overcrowding, the body corporate should be able to approve a resolution giving consent on behalf of the occupier of a lot, for the lot to be inspected by the relevant authority to determine whether the lot is overcrowded.</p>
8	<b>Standard by-laws</b>
	<p>The BCCM Act should be updated to include example by-laws that cover specific topics including internal dispute resolution, parking and towing, pets and smoking.</p> <p>The BCCM Act should provide that if a scheme adopts an example by-law then that by-law is valid and enforceable.</p>
9	<b>Default application of standard by-laws</b>
	There should be no change in the application of the by-laws in schedule 4 of the BCCM Act.
10	<b>By-laws to form a greater part of pre-purchase disclosure</b>
	<p>The by-laws for a scheme should be included in the disclosure regime for every sale of a lot in that scheme. The by-laws for a scheme should be given to each tenant of a lot in a scheme when that tenant enters into a lease of the lot.</p> <p>The BCCM Act should expressly deem the by-laws to have effect as a binding agreement executed between each of the body corporate, lot owners, tenants and mortgagees from time to time.</p>
11	<b>Fines for breach of by-laws</b>
	<p>The BCCM Act should allow bodies corporate to issue a fine of up to two penalty units to lot owners and occupiers who continue to breach particular by-laws after receiving a contravention notice.</p> <p>The ability to issue fines will not be automatic. The body corporate in a general meeting must approve a by-law authorising the imposition of fines for breach of particular by-laws before any fines can be issued.</p> <p>The fine must be given using a prescribed form and cannot exceed a statutory maximum amount of two penalty units. The fine should be paid to the body corporate.</p> <p>The accused person must have the ability to dispute the fine through the BCCM Commissioner's office and the onus of proving that the breach occurred will rest with the body corporate.</p> <p>Fines that are not paid or disputed within 30 days after being issued will become a body corporate debt on the lot, recoverable by the body corporate using the debt recovery mechanisms provided in the BCCM Act for unpaid contributions.</p> <p>If a fine incurred by a tenant is unpaid, the body corporate may recover the fine from the lot owner. The lot owner may recover the amount from the tenant as a debt.</p>
12	<b>Delegation of enforcement</b>

NUMBER	RECOMMENDATION
	The body corporate should not be given the ability to delegate a power to issue contravention notices. There should be no change to the current position in this regard.



NUMBER	RECOMMENDATION
<b>DEBT RECOVERY</b>	
<b>13</b>	<b>Scale of costs</b>
	<p>The BCCM Act should provide an itemised scale of costs for debt recovery actions taken by or on behalf of the body corporate to recover unpaid contributions and penalty interest from defaulting lot owners. The scale should apply to debt recovery actions taken prior to the commencement of legal proceedings (if any).</p> <p>Costs incurred in recovery of body corporate debt after the commencement of legal proceedings should continue to be determined by a court in accordance with its usual procedures. The 'reasonably incurred' test will continue to apply to such applications.</p>
<b>14</b>	<b>Items in a scale of costs</b>
	<p>The scale of costs should be binding on bodies corporate. The scale should prescribe maximum amounts that can be charged by the body corporate to lot owners for debt recovery items such as:</p> <ul style="list-style-type: none"> <li>• arrears notices;</li> <li>• letters of demand;</li> <li>• negotiating and monitoring compliance with a payment plan; and</li> <li>• legal costs.</li> </ul> <p>The amount of the scale and the other items to be included should be determined based on consultation with community titles industry groups and qualified costs assessors.</p>
<b>15</b>	<b>Definition of body corporate debt</b>
	<p>The definition of 'body corporate debt' should be amended to specifically include recovery costs in accordance with the scale and judgment debts. Recovery costs that are not disputed with the body corporate within 60 days after notice is given to the lot owner will become a body corporate debt on the lot.</p> <p>The contact details of a mortgagee of a lot must be notified to the body corporate and kept on the body corporate roll. When a lot owner is issued a demand for a body corporate debt, a copy of the notice must be sent to the mortgagee at the address listed in the body corporate roll.</p> <p>If the body corporate debt owed by a lot owner relates only to recovery costs that are subject to a dispute which has been lodged with the body corporate, the lot owner should not forfeit the right to vote at a general meeting or to nominate for a committee position.</p>
<b>16</b>	<b>Power of sale</b>
	<p>There should be no change to the ability of the body corporate to force the sale of a lot for unpaid contributions.</p>

NUMBER	RECOMMENDATION
17	<b>Body corporate debt to form a charge on the lot</b>
	<p>The BCCM Act should provide that unpaid body corporate debt for the lot is a statutory charge on the lot but such charge does not represent an interest in the lot for the purposes of the <i>Land Title Act 1994</i> (Qld) or the BCCM Act.</p> <p>The statutory charge for body corporate debt will be lower in priority than charges for unpaid rates and unpaid land tax.</p>
18	<b>Debt recovery time</b>
	The body corporate should be required to take action to recover unpaid contributions within two months after any contributions have been outstanding for one year.
19	<b>Address for service</b>
	<p>The Regulation Modules should require all lot owners to provide an address for service that is in Australia.</p> <p>If an Australian address is not provided or has been determined to be inaccurate, the address for service will be deemed to be the address of the lot.</p>
20	<b>Overseas service</b>
	It is recommended that the existing rules in relation to the service of originating process to collect unpaid contributions, penalty interest and recovery costs should remain unchanged at this time.
21	<b>Garnishee rental income</b>
	<p>Where there is a judgment against a lot owner for unpaid contributions, penalty interest and recovery costs, and the lot is generating income from being rented or leased, the body corporate should have a simple method to garnishee the rental income until the judgment has been satisfied.</p> <p>Where the garnishee order is not directed against the lot owner, it may be directed against an agent of the lot owner (if any) who is receiving rental income on behalf of the lot owner.</p>

NUMBER	RECOMMENDATION
<b>SCHEME TERMINATION</b>	
<b>22</b>	<b>Prescribed procedure for scheme termination</b>
	<p>It is recommended that the BCCM Act provide a prescribed procedure for schemes considering scheme termination. The prescribed procedure may include the collection of relevant information and will include the preparation of a termination plan. This will be followed by a vote of the body corporate to approve the termination plan.</p> <p>Where the body corporate is unable to resolve to approve the termination plan, a lot owner or the body corporate may apply to the District Court for an order approving the termination plan.</p>
<b>23</b>	<b>Acquiring relevant information</b>
	<p>It is recommended that unless otherwise agreed by a resolution without dissent, a body corporate considering scheme termination should resolve to obtain or assemble the following reports and documents (together, the <b>relevant information</b>):</p> <ul style="list-style-type: none"> <li>• a structural engineer's report;</li> <li>• a quantity surveyor's report;</li> <li>• a valuation of the total value of the common property and all the lots including the individual value of each lot in the scheme; and</li> <li>• a draft statement of the assets and liabilities of the body corporate.</li> </ul> <p>After the relevant information has been obtained or assembled, copies should be given to each lot owner in the scheme. Lot owners should then have at least 90 days to review the relevant information.</p>
<b>24</b>	<b>Considering the relevant information</b>
	<p>At least 90 days after all lot owners have been given copies of the relevant information the body corporate may agree by majority resolution that there are economic reasons for scheme termination as disclosed by the relevant information.</p> <p>A lot owner who disagrees with the decision of the body corporate that economic reasons for scheme termination exist may dispute the decision using the existing dispute resolution mechanisms in the BCCM Act.</p> <p>It is recommended that such a dispute be treated as a complex dispute for the purposes of the BCCM Act so that the matter may be resolved by a specialist adjudicator or by the Queensland Civil and Administrative Tribunal (<b>QCAT</b>) in its original jurisdiction.</p>

NUMBER	RECOMMENDATION
25	<p align="center"><b>Preparing a termination plan</b></p>
	<p>It is recommended that the body corporate may agree by ordinary resolution to appoint a <b>facilitator</b> to oversee the preparation and development of a collective sales agreement, redevelopment plan or other proposal to terminate the scheme (each a <b>termination plan</b>). Such a plan may be submitted by a person who proposes to acquire the lots in the scheme and developed through a negotiation process with the body corporate.</p> <p>Once the termination plan is prepared, the facilitator will send a copy of the plan to all lot owners for consideration. At least 120 days after the termination plan has been given to all lot owners, the body corporate may hold a general meeting to vote on the termination plan.</p> <p>The proceeds of the termination plan and the assets and liabilities of the body corporate will be allocated among the lot owners in proportion to the <b>relative market value</b> of each lot immediately prior to termination (the value of the lot expressed as a percentage of the total value of all lots in the scheme).</p>
26	<p align="center"><b>Approving a termination plan</b></p>
	<p>A termination plan that has been given to lot owners for at least 120 days may be approved by the body corporate in a general meeting by a resolution without dissent. Alternatively, if the relevant information discloses an economic reason for the proposed termination (as agreed by a majority of lot owners), the termination plan may be approved by the body corporate in a general meeting with the support of the owners of at least 75% of the lots in the scheme.</p> <p>Where the termination plan is approved by the body corporate, the body corporate must give all lot owners notice in the prescribed form stating that the termination plan has been approved and setting out the lot owner's obligations under the termination plan and the right to challenge the decision in the District Court.</p> <p><b>Dissenting owners</b> may apply to the District Court to decide whether or not the termination plan should proceed if that application is made within 120 days after the lot owner has been given notice in the prescribed form that the body corporate has approved the termination plan.</p>

NUMBER	RECOMMENDATION
27	<p align="center"><b>Application to the District Court</b></p>
	<p>On application by a lot owner or the body corporate of a scheme to the District Court for an order giving effect to a termination plan that has not been approved by the body corporate:</p> <ul style="list-style-type: none"> <li>the District Court will make a determination as to whether to give effect to the termination plan or not;</li> <li>the District Court must be satisfied that the termination plan is just and equitable; and</li> <li>the onus to satisfy the District Court that the termination plan is just and equitable will be on the applicant.</li> </ul> <p>On application by a dissenting lot owner against a termination plan approved by the body corporate (if the application is brought within 120 days after the lot owner has been given notice in the prescribed form):</p> <ul style="list-style-type: none"> <li>the District Court will make a determination as to whether to give effect to the termination plan or not;</li> <li>the District Court must be satisfied that the termination plan is just and equitable; and</li> <li>the onus to satisfy the District Court that the termination plan is just and equitable will be on the body corporate.</li> </ul> <p>After the 120 day period has expired, the administrator of the termination plan approved by the body corporate may bring an action in the District Court requiring a lot owner to comply with the termination plan. On such application the District Court will determine whether the dissenting lot owner's opposition and failure to comply with the termination plan is reasonable in the circumstances and make orders accordingly.</p> <p>In all circumstances, the District Court will retain the discretion to make an order about costs as the court sees fit.</p>
28	<p align="center"><b>Determining 'just and equitable'</b></p>
	<p>The District Court should have reference to the following factors when determining whether a termination plan is just and equitable:</p> <ul style="list-style-type: none"> <li>any structural engineer's report, quantity surveyor's report or valuation prepared for the purposes of scheme termination at the scheme;</li> <li>any termination plan, collective sales agreement or redevelopment plan prepared by the person proposing the termination;</li> <li>the economic reasons for the termination plan;</li> <li>the consequences to lot owners (both individually and as a whole) if the scheme is terminated;</li> <li>the consequences to lot owners (both individually and as a whole) if the scheme is not terminated;</li> <li>the age and condition of the building or any structures on scheme land;</li> <li>sinking fund forecasts and current balance;</li> <li>the aggregate market value of individual lots compared to the market value of the scheme as a whole in its highest and best use;</li> <li>any other factor specified in the relevant Regulation Module; and</li> <li>any other factor the Court decides is relevant.</li> </ul>

NUMBER	RECOMMENDATION
29	<b>Terminating layers of layered schemes</b>
	<p>The Department of Justice and Attorney-General should investigate the feasibility of developing a simplified process to allow termination of a community titles scheme without terminating the lots in the scheme.</p> <p>Such a process would be exercised in appropriate circumstances with the support of the lot owners in the relevant schemes.</p>

## 1.5. Rationale for the Recommendations

Bodies corporate are often referred to as the ‘fourth tier of government’.<sup>6</sup> Like a government, bodies corporate provide services and create laws (in the form of by-laws). Unlike a government, however, bodies corporate are made up of private individuals who voluntarily enter into agreement with other private individuals to share the costs of owning and maintaining private property. The mixture of individual ownership of lots and collective ownership of common property creates unique challenges for balancing individual and collective rights. If some individuals fail to follow the rules or pay their share of the expenses, this can have dramatic consequences for the other individuals in the community.

In a democratic community, decisions are made according to the will of the majority and there is protection for the rights of the minority. As self-governing communities, community titles schemes require the ability to make decisions even where some members of the community do not agree with those decisions. Provided there is protection for the rights of dissenting owners, the body corporate should have the ability to self-determine the rules for the community.

The Options Paper identified a number of areas in the BCCM Act where the mechanisms used to balance individual and collective rights may be improved. The public was invited to make submissions as to how this might best be achieved. By and large, the submissions were supportive of the options suggested in the Options Paper.

The Recommendations contained in this paper are based on the submissions to the Options Paper, discussions with relevant stakeholders and a review of practices in other jurisdictions. The Centre is committed to making recommendations that are practical, which create certainty and which are balanced.

The Recommendations are intended to harmonise with the objects of the BCCM Act. In particular, the Recommendations seek to balance the rights of individuals with the responsibility for self-management inherent in community titles schemes and to ensure that bodies corporate have control of the common property and the body corporate assets they are responsible for managing on behalf of lot owners. The Recommendations are intended to give bodies corporate the flexibility they need to deal with changing circumstances within community titles schemes.

This paper is organised into sections, based on the sections in the Options Paper. The sections below are generally organised in a way that gives the background to the issues and a brief overview of the submissions on that topic. Where relevant, the Centre’s recommended approach is given following the discussion on each topic area.

Section 2 of this paper discusses by-law enforcement using the examples of towing, pets, smoking and overcrowding. Section 3 addresses debt recovery and makes recommendations to improve the body corporate’s ability to recover unpaid amounts from lot owners. Section 4 considers the contentious issue of scheme termination and proposes a number of amendments to the existing provisions that are intended to facilitate urban renewal and redevelopment where it is needed.

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<sup>6</sup> Hazel Easthope and Bill Randolph, ‘Governing the Compact City: The Challenges of Apartment Living in Sydney, Australia’ (2009) *Housing Studies* 24(2), 243-259 at 248.

## 2. By-law enforcement

The Options Paper presented a view point, which is held by a number of strata industry stakeholders, that the existing by-law enforcement mechanisms for community titles schemes may not be adequately suited to dealing with particular concerns of an immediate nature. The Options Paper discussed the issues of parking, pets, smoking and overcrowding as examples of areas where by-law enforcement could be improved.

A number of specific questions regarding parking, pets, smoking and overcrowding were raised. The responses to these questions are discussed at paragraphs 2.1 to 2.4 below. Further questions considered the by-law enforcement mechanisms generally and sought input on ways to improve the body corporate's ability to enforce by-laws. The responses to these questions are discussed at paragraph 2.5 below.

### 2.1. Vehicle parking and towing

There are three situations in which it may be necessary to have a vehicle towed away from a community titles scheme. The first situation is when a vehicle is parked on common property in breach of a by-law in non-urgent circumstances, for example where an owner or occupier has parked a vehicle in a space reserved for visitors to the scheme. The second is when a vehicle is parked on common property in such a way that it creates a hazard to lot owners and occupiers and seriously impedes the functioning of the scheme or part of the scheme and requires urgent action (**urgent circumstances**).<sup>7</sup> The third is when a vehicle is parked in a space belonging to another lot without the permission of the lot owner or occupier.

Currently, bodies corporate can, and do, tow vehicles from the common property. Towing may occur when a third party not connected to the scheme (who is basically trespassing) parks their vehicle on the common property and then visits an adjacent property. This is most likely to occur at schemes close to railway stations, large shopping complexes or hospitals. In these situations, the body corporate may have a common law right to remove the vehicle. Such rights are outside the scope of the BCCM Act.<sup>8</sup> It is up to the body corporate to seek legal advice to determine the extent of any such common law rights and to decide whether it is willing to accept the associated risks.

Problems may arise, however, if the vehicle that is towed belongs to a lot owner or occupier or to a genuine visitor to the scheme. If the vehicle is towed for contravening the by-laws and the contravention notice procedure<sup>9</sup> is not followed, the vehicle may have been unlawfully towed. This may leave the body corporate exposed to liability for any damage that arises to the vehicle when it is towed and stored in a towing yard. Even if the contravention process is followed, it is unclear whether the body corporate can actually tow a lot owner or occupier's vehicle without an order from an adjudicator.

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<sup>7</sup> The Options Paper (at p 18), used the phrase 'special circumstances.' Here, special circumstances are referred to as 'urgent circumstances' to contrast them with non-urgent circumstances.

<sup>8</sup> Although the body corporate is still required to comply with the obligation to act reasonably in making the decision to remove the vehicle: BCCM Act s 94(2). See also *Aztec on Joyce* [2013] QBCCMCmr 28 at para 9.

<sup>9</sup> Set out in BCCM Act ss 182-188.



It has been argued by industry groups and lot owners that the body corporate should have an express authority to tow vehicles for breach of the by-laws in both urgent and non-urgent circumstances. The Options Paper asked four questions dealing with towing and parking and asked what types of safeguards should be in place to protect the interest of lot owners and bona fide visitors to the scheme.

Under the current legislation there is no express authority in the BCCM Act for the body corporate to tow a vehicle in any situation. Despite this, some bodies corporate are willing to accept the risks and will tow vehicles. Given that towing is already occurring at schemes (and likely to increase as higher density schemes are built with fewer car parks per lot) it is prudent that the BCCM Act provide proper procedures to facilitate towing. This will allow bodies corporate to better regulate the use of the common property and reduce the liability of the body corporate. In addition, this will provide protection for lot owners by making clear the situations in which vehicles can be towed.

Obviously, not all schemes will choose to address the issue of parking. Parking may not be an issue at some schemes. Other schemes may not have a body corporate manager, a resident manager or a committee member who lives on site. At these schemes, it may be impossible to identify when a parking by-law has been breached and immediate enforcement will be problematic. Such schemes may choose not to adopt a towing by-law and to instead rely on the existing enforcement mechanisms should parking become a concern.

At schemes where parking is an issue, there must be a process to address the issue. The following paragraphs outline a procedure to allow towing to occur where necessary in a way that protects the interests of the body corporate, lot owners and the general public.

### **2.1.1. Towing for breach of the by-laws in non-urgent circumstances**

#### **Options Paper Question 1<sup>10</sup>**

**Should bodies corporate have the express ability to tow a vehicle that has been parked in a visitor car park in contravention of the by-laws?**

A total of 96 submissions provided a clear comment on whether the body corporate should have an express authority to tow vehicles when the vehicle is parked on common property in breach of a by-law in non-urgent circumstances.

Of these submissions, the vast majority (70 submissions) supported extending this authority to the body corporate. Other submitters (22 submissions) argued that the right to tow should depend on the circumstances, the procedure followed by the body corporate and the amount and type of notice given to the person in control of the vehicle.<sup>11</sup>

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<sup>10</sup> The Options Paper asked for public submissions in relation to 29 questions. The questions are repeated in this paper.

<sup>11</sup> The person in control of the vehicle may or may not be the vehicle owner. For ease of reference, in this section, the person in control of the vehicle will be referred to as the vehicle owner, even if that person is not the legal owner of the vehicle.

Only four submissions expressed a clear preference against granting bodies corporate this authority. The reasons given for opposing this include that such an authority may intensify disputes between neighbours; it may be selectively exercised; and that this function should only be performed by the local council.

The SCA, OCN and ARAMA and the UOAQ were all in favour of giving the body corporate an express authority to tow vehicles. The SCA was clear that this authority should only be exercisable where:

- an appropriate by-law<sup>12</sup> has been adopted by the body corporate;
- appropriate signage<sup>13</sup> is displayed on scheme land; and
- the proper procedure is followed (the SCA supported the procedure proposed in the Options Paper).<sup>14</sup>

Given the broad support across the strata industry and among lot owners, the Centre is of the view that bodies corporate should have the ability to tow vehicles that are parked in breach of a by-law immediately in urgent circumstances and subject to adequate notice in non-urgent circumstances.

Any express authority to tow vehicles must be subject to adequate safeguards (such as an appropriately adopted by-law, adequate signage listing the parking restrictions and a reasonable amount of notice given prior to the vehicle being towed away) to protect the rights of the person in control of the vehicle. There will also need to be an ability for the person in control of the vehicle to challenge the towing and require the body corporate to demonstrate that the appropriate procedure has been followed.

The body corporate must be required to adopt adequately worded by-laws giving it the authority to tow vehicles in both non-urgent circumstances and urgent circumstances (discussed further below) before it exercises this new authority. This means that lot owners will have to adopt the by-law at a general meeting. Lot owners and occupiers should then all be aware of the by-law (as the by-laws are included in the community management statement (**CMS**) for the scheme and form part of tenancy agreements).<sup>15</sup> The CMS and the schedule of by-laws should be reviewed by prospective purchasers prior to buying a lot in the scheme.

In addition, the body corporate must be required to erect appropriate signage on the common property. This will give notice to visitors to the scheme and others who may not have access to the by-laws.

The decision to tow a vehicle in non-urgent circumstances for breach of a by-law must always rest with the body corporate (although the decision may be made by the committee, either at a committee meeting or by a vote outside of a committee meeting).<sup>16</sup>

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<sup>12</sup> For an example of an appropriate by-law, see paragraph 2.1.1.1.

<sup>13</sup> For an example of appropriate signage, see paragraph 2.1.1.2.

<sup>14</sup> Options Paper, p 19-20.

<sup>15</sup> By-laws are taken to be terms of the rental agreement and a copy must be given to the tenant when signing the lease: *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 52(2) and s 69.

<sup>16</sup> Aside from restricted issues, a decision of the committee is a decision of the body corporate: BCCM Act ss 100(1)-(2).

### 2.1.1.1. Example towing by-law

Prior to exercising a power to tow vehicles from common property, the body corporate must adopt an appropriate by-law. An example of an appropriate by-law authorising towing in both non-urgent and urgent circumstances is as follows:<sup>17</sup>

#### **1 Vehicles**

(1) *The occupier of a lot must not—*

*(a) park a vehicle, or allow a vehicle to stand, in a regulated parking area; or*

*(b) without the approval of the body corporate, park a vehicle, or allow a vehicle to stand, on any other part of the common property; or*

*(c) permit an invitee to park a vehicle, or allow a vehicle to stand, on the common property, other than in a regulated parking area.*

(2) *An approval under subsection (1)(b) must state the period for which it is given.*

(3) *The body corporate may cancel the approval by giving 7 days written notice to the occupier.*

(4) *In this section—*

**regulated parking area** means an area of scheme land designated as being available for use, by invitees of occupiers of lots included in the scheme, for parking vehicles.

#### **2 Towing**

(1) *Any vehicle parked in a regulated parking area for a time greater than [INSERT CONDITIONS IN SIGNAGE, I.E. 12 HOURS] without the approval of the body corporate may be towed away provided the body corporate:*

*(a) gives a notice (first notice) to the person in charge of the vehicle, or if that person cannot be identified, places a notice on the vehicle, stating that if the vehicle is not removed, or the consent of the body corporate is not requested, within [insert a reasonable amount of time] after the notice is given, the vehicle may be towed away at the expense of the person in charge of the vehicle; and*

*(b) if the vehicle has not been removed after [TIME IN 2(1)(a)], gives a notice (second notice) stating that the vehicle may be towed away at any time without further notice; and*

*(c) after the second notice has been given, the body corporate decides to initiate the towing of the vehicle.<sup>18</sup>*

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<sup>17</sup> This example is based on the standard by-laws in schedule 4 of the BCCM Act.

<sup>18</sup> The body corporate may make this decision a restricted matter or allow the committee to make this decision on behalf of the body corporate.

(2) *Any vehicle parked or standing on the common property other than in a regulated parking area and in a manner that:*

*(a) materially impedes ingress and egress:*

*(i) to a lot; or*

*(ii) of vehicles (including emergency vehicles) at the scheme;*

*(b) blocks access to critical infrastructure such as water, electricity or fire safety plant and equipment which may have to be accessed or repaired urgently (including blocking egress for fire escapes);*

*(c) denies access to other vehicles delivering goods or services; or*

*(d) blocks or seriously restricts the access of customers to commercial occupiers in the scheme (each an **urgent circumstance**),*

*may be towed from the common property on behalf of the body corporate immediately and without notice if, after making a reasonable attempt to locate the driver of the vehicle to request the vehicle be moved, the vehicle has not been moved.*

(3) *In the event that a vehicle is towed from the common property in urgent circumstances or from a regulated parking area in non-urgent circumstances, the onus of proof that the vehicle was in fact parked in urgent circumstances or parked without the approval of the body corporate will remain with the body corporate.*

(4) *The body corporate must engage a licensed tow truck operator to remove the vehicle.*

(5) *Provided the body corporate has complied with this by-law and the Act,<sup>19</sup> the body corporate will not be liable for any loss or damage to the towed vehicle.*

### **2.1.1.2. Signage on the common property**

Prior to exercising a power to tow vehicles from common property (including a regulated parking area), the body corporate must be required to post appropriate signage in a conspicuous location at the scheme. As a very minimum, the signage must state:

- the parking restrictions that are in force for regulated parking areas;
- that vehicles may be towed at the risk and expense of the vehicle owner or the person in control of the vehicle; and
- the contact details for the body corporate.

Signage may also designate particular areas of common property as 'no-parking' areas. This will assist with determining when a vehicle is parked in urgent circumstances. However, it may not be possible to post signage to cover every 'no-parking' area of common property.

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<sup>19</sup> BCCM Act.

### **2.1.1.3. The first notice**

Prior to towing a vehicle in non-urgent circumstances, the body corporate must be required to give to the person in control of the vehicle,<sup>20</sup> or if that person is unknown or cannot be located, place on the vehicle, notice of the breach and that towing may result. The sample by-law above contemplates a first and second notice. It is recommended that the notice be given in a prescribed form.

It is recommended that the prescribed form of the first notice include the following information:

- the date and time of the offence;
- a description of the vehicle, including the make, model (if known), colour and registration number;
- the by-law that is being breached;
- the contact details of the body corporate;
- the amount of time the person in control of the vehicle has to remove the vehicle or to seek body corporate approval to park before a second notice is issued; and
- the person's right to dispute the notice.

### **2.1.1.4. The second notice**

If the vehicle has not been removed after the first notice, a second notice must be given, also in a prescribed form. It is recommended that the prescribed form of the second notice include the following information:

- the date and time that the second notice is issued;
- a description of the vehicle, including the make, model (if known), colour and registration number;
- the by-law that is being breached;
- that this notice is the second notice;
- that the body corporate may decide at any time after the second notice has been given to authorise the removal of the vehicle;
- that once a decision is made, the vehicle may be towed without further notice;
- that if the vehicle is towed, it will be at the risk and expense of the person in control of the vehicle (or the vehicle owner); and
- who to contact in the event that the vehicle has been towed.

## **2.1.2. Towing in urgent circumstances**

Unlike towing a vehicle parked in breach of a by-law in non-urgent circumstances, towing vehicles in urgent circumstances may be a matter of immediate concern requiring urgent action. The vehicle may need to be removed immediately to ensure that in the event of a medical emergency, a fire or a breakdown in essential plant and equipment, there is clear access to the common property. Other urgent circumstances may include where vehicles:

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<sup>20</sup> Who may or may not be the vehicle owner.

- materially impede ingress and egress to a lot or of other vehicles (including emergency vehicles) to the scheme land;
- block access to critical infrastructure such as water, electricity or fire safety plant and equipment which may have to be accessed or repaired urgently (including blocking egress for fire escapes, which may put the body corporate in breach of fire safety regulations);
- deny access to other vehicles delivering goods or services; or
- block or seriously restrict the access of customers to commercial occupiers in schemes.

If bodies corporate are to have an authority to tow vehicles in urgent circumstances it is appropriate that the urgent circumstances be set out in a by-law adopted by the body corporate in a general meeting and included in the CMS for the scheme. Tenants and prospective purchasers should review the CMS and be (or be deemed to be) aware of the by-law and the urgent circumstances when leasing or purchasing a lot. The example by-law discussed at paragraph 2.1.1.1 above includes a list of urgent circumstances.

#### **Recommendation 1: Towing for breach of parking by-laws**

Where a body corporate has adopted appropriate by-laws and erected appropriate signage on the common property, that body corporate should have the express ability to engage a licensed tow truck operator to remove a vehicle parked without the body corporate's consent from the common property:

- at a reasonable time after sufficient notice in the prescribed form has been given in non-urgent circumstances; and
- immediately and without notice when the vehicle is parked in a way that blocks ingress and egress to a lot, the scheme land, fire doors or other critical infrastructure (**urgent circumstances**).

### **2.1.3. Delegating authority to tow in urgent circumstances**

In non-urgent circumstances, the decision to tow the vehicle must always remain with the body corporate (even where it is exercised by the committee). There must be adequate notice and a reasonable amount of time before the body corporate can decide to tow a vehicle from the common property. Urgent circumstances are different. There may be good reason to allow the body corporate to remove the vehicle immediately. To achieve this, it may be necessary for the body corporate to delegate a power to an authorised person to make decisions to tow vehicles when urgent circumstances exist.

#### **Options Paper Question 2**

**Who should be authorised to initiate towing a vehicle in special circumstances (e.g. a resident manager (where one has been appointed) or a designated member of the committee who lives on-site)?**

A number of submissions raised concerns about authorising a committee member or a resident manager to initiate towing in urgent circumstances. While some submissions argued that a resident manager would be an appropriate person to initiate towing, others argued that the resident manager must remain impartial in disputes. Some argued that the decision should not be made by just one person.

Under the BCCM Act, the body corporate cannot delegate its powers.<sup>21</sup> This means that the body corporate cannot delegate decision making power to allow a person to determine that urgent circumstances exist and to arrange for a vehicle to be towed. However, in the case of urgent circumstances, there is a valid argument for this to be changed.

The SCA supports changing the prohibition on delegation so that the body corporate can delegate decision making power to a service contractor, authorising that person to determine that a vehicle is parked in circumstances that require the urgent removal of the vehicle and to have the vehicle towed. An appropriate delegate may be the resident manager, a body corporate manager or a resident committee member provided:

- the body corporate consents to the delegation;
- the delegated person accepts the delegation;
- the delegated person is appropriately appointed by the body corporate;
- an appropriate towing by-law has been adopted; and
- appropriate signage is displayed on the common property.

ARAMA commented that a delegation of decision making power to the resident manager must be the subject of a separate and distinct service contract (and not part of the existing caretaking service contract between the resident manager and the body corporate). The person accepting the delegation must freely consent to the delegation and should be appropriately remunerated for the service. ARAMA has submitted that the delegate must be free to give up the delegation (end the service contract) with appropriate notice.

A delegation to a resident manager or a body corporate manager would likely be under a service contract where the body corporate employs the delegated person to perform the task. A delegation to a committee member would be different in that it would be inappropriate for this to be subject to a service contract. Rather, a committee member who is delegated this authority would perform it as part of the duties of the role of committee member and not be remunerated. As with a delegation under a service contract, the committee member would have to accept this delegation.

The OCN supports a delegation to the resident manager but not to an onsite committee member as this may lead to bias or perceptions of bias and exacerbate disputes. However, not all schemes have on-site resident managers and not all schemes are professionally managed. Given this, it is likely that some schemes may wish to delegate authority to an onsite committee member. However some schemes may have no issues with parking and may not wish to adopt a towing by-law. As discussed above at paragraph 2.1, some schemes may not need to address this issue.

For schemes where this is a problem, the Centre recommends that there should be a limited exception to the prohibition on delegation of power by the body corporate that will allow for a delegation of

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<sup>21</sup> BCCM Act s 97 provides that a body corporate cannot delegate its powers.

decision making power in the case of urgent circumstances. This change may be justified based on the strong support among the submissions and the desirable practical purpose that can be achieved. The exception must be narrowly drawn so as to only allow an authorised person to determine that a vehicle is parked in urgent circumstances and to then initiate the towing of that vehicle when necessary.

Obviously, the body corporate will not be required to delegate this authority and may choose to deal with towing in urgent circumstances via a body corporate or committee decision. Additionally, any delegation given in this way may be revoked by the body corporate at any time.

The delegation to a third party should be on the basis that the delegate is indemnified by the body corporate for any loss or damage arising to the owner of the towed vehicle. If the body corporate is unwilling to give this indemnity to the person, the body corporate should not make the delegation.

#### **Recommendation 2: Delegating the decision to tow in urgent circumstances**

Where a body corporate has adopted appropriate by-laws and erected appropriate signage on the common property, that body corporate should be able to delegate decision making authority to:

- a body corporate manager or a resident manager under a service contract; or
- a specified committee member who lives on site,

to decide whether a vehicle is parked on the common property in urgent circumstances, and where urgent circumstances exist, to arrange for the vehicle to be towed from the common property by a licensed tow truck operator.

Where the body corporate decides to delegate this power, the delegation to a body corporate manager or resident manager will be performed under a service contract with the body corporate. If the delegation is to a committee member who lives on site, that delegation will be authorised by a resolution of the body corporate (and not performed under a service contract). The body corporate will remain liable for any loss or damage to the owner or person in control of the towed vehicle and must indemnify the delegate appropriately.

For the avoidance of doubt, implementation of this recommendation will require an exception to the general prohibition on delegation of power by the body corporate.

### **2.1.4. Lot occupier's authority to tow**

#### **Options Paper Question 3**

**What right should a lot owner have to deal with a vehicle parked in their space without permission?**



A number of submissions to the Options Paper argued that a lot owner or occupier should have a right to immediately, and without notice, remove an unknown vehicle parked in the space belonging to that lot.<sup>22</sup>

Some submissions argued that this right should be the same as would be available to an owner of a stand-alone house to have the vehicle removed.

While there was a general consensus that the lot occupier should have this right, there was no clear agreement on how it should be exercised. Some submissions supported giving the lot owner /occupier the right to directly engage a tow truck to remove the vehicle. Others argued that the body corporate should arrange the towing. It was even submitted that tow truck operators would not remove a vehicle from a private parking space in a community titles scheme as this would require towing the vehicle over common property.

At common law, a lot owner or occupier may have a right to deal with a vehicle parked on their lot without their permission. Lot occupiers may seek legal advice to determine the scope of any such rights, which are, and should remain, outside the scope of the BCCM Act.

Where a lot owner or occupier finds an unknown vehicle parked on their lot or in an exclusive use common area allocated to their lot under an exclusive use by-law, that lot owner or occupier may be able to exercise any common law rights that have accrued to them. The removal of the vehicle should be organised by the lot owner or occupier and the tow truck company directly. The body corporate or a resident manager may assist in this process, but the liability for removing the vehicle will rest with the lot owner. Any dispute the person in control of the vehicle may have with the lot owner or occupier must be dealt with in an appropriate forum.

### **Recommendation 3: Lot owner / occupier's right to tow**

The right of a lot owner or occupier to remove a vehicle parked without permission on their lot or in an exclusive use common area allocated to their lot is outside the scope of the BCCM Act.

## **2.1.5. Body corporate liability for improperly towed vehicles**

### **Options Paper Question 4**

**Should the body corporate be liable to pay for the costs of recovering the vehicle and the cost of dispute resolution in the BCCM Commissioner's office if a vehicle is towed away improperly (either in special circumstances or non-urgent circumstances)? What other safeguards should be placed on the body corporate's ability to tow vehicles?**

Almost every submission that addressed this question felt that the body corporate should be liable for the costs of recovering the vehicle if it has been improperly towed away. Some argued that if clear

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<sup>22</sup> Either as a parking space that is on the title to that lot, or as an area of common property that is subject to an exclusive use by-law benefiting the lot.

guidelines are established in the legislation, there is very little chance that a vehicle will be improperly towed unless the body corporate fails to comply with proper procedure.

The body corporate must be required to demonstrate that the vehicle was towed in urgent circumstances or for breach of a by-law in non-urgent circumstances and that the proper procedure was followed. If it cannot demonstrate this then the body corporate should be liable to the person in control of the vehicle for any loss or damage to the vehicle or any amounts associated with the towing and storage of the vehicle.

A duly authorised person acting under a delegation is acting on behalf of the body corporate. As such, the delegate should not be liable for any loss or damage to the vehicle or suffered by the person in control of the vehicle, provided the proper procedure is followed. The liability for loss or damage should remain with the body corporate even where the towing is exercised by a delegate. The body corporate should provide an appropriate indemnity to the delegate in the service contract (if the person is a body corporate manager or an on-site manager) or in the delegation to the committee member who lives on site. If the body corporate is not prepared to give this indemnity to the person, that person should not be given a delegation.

If the vehicle that is towed belongs to a lot owner or occupier, that person may bring a dispute under the BCCM Act<sup>23</sup> through the Office of the Commissioner for Body Corporate and Community Management (**BCCM Commissioner**) if they feel the vehicle has been improperly towed. If the vehicle that is towed belongs to a third party who is not connected to the scheme, that person will not have standing to bring a dispute under the BCCM Act and would be required to challenge the towing in an appropriate forum, if necessary.<sup>24</sup>

#### **Recommendation 4: Liability for improper towing**

If the body corporate has adopted appropriate by-laws, posted appropriate signage on the common property and towed a vehicle (either as a result of a body corporate decision or a decision by a delegate) following the proper procedure as set out in the legislation, the body corporate will not be liable to the owner or person in control of the vehicle for any loss or damage to the vehicle or any amounts associated with the towing and storage of the vehicle.

A duly authorised service contractor or a committee member acting under a delegation from the body corporate to tow vehicles in urgent circumstances will be acting as an agent of the body corporate when towing vehicles in urgent circumstances.

The onus of proof that the vehicle has been towed in accordance with the proper procedure should at all times remain with the body corporate.

A dispute as to whether the body corporate (or its delegate) has exercised the proper procedure when towing a vehicle must be heard in the appropriate forum.

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<sup>23</sup> BCCM Act Chapter 6. The BCCM Commissioner has jurisdiction to resolve disputes among specified parties under the BCCM Act. For the purposes of the BCCM Act, a 'dispute' is defined as a dispute between particular parties: BCCM Act s 227. A person who is not a lot owner or occupier does not have standing under the BCCM Act to take dispute resolution actions against a body corporate through the BCCM Commissioner's office.

<sup>24</sup> The appropriate forum will depend on the nature and amount of the claim.

## 2.2. By-law prohibiting the keeping of pets in a lot or on common property

One of the more contentious issues raised in the Options Paper concerns the enforceability of by-laws prohibiting pets in community titles schemes. The Options Paper presented two options to address the issue of pets. The first is to leave the existing provisions as is, continuing the situation that bodies corporate cannot enforce by-laws prohibiting pets, but may grant consent for pets on a case by case basis subject to particular reasonable conditions. The second is to allow bodies corporate to enforce a no pets by-law,<sup>25</sup> if that by-law has been adopted by a resolution without dissent, or if it was in place when the scheme was created.

The River City decision<sup>26</sup> held that bodies corporate have a power to regulate, but not to prohibit, the keeping of pets. This means that under the existing legislation the body corporate cannot enforce any by-law that purports to prohibit behaviour, including a by-law prohibiting pets.

The Centre suggested that a resolution without dissent be used to adopt a no pets by-law. A by-law which prohibits behaviour should be subject to a higher threshold than that required for an ordinary by-law (which requires a special resolution)<sup>27</sup> because a prohibitive by-law is more likely to infringe on the existing rights of lot owners and occupiers.

### Options Paper Questions 5-6

**Should bodies corporate have the right to decide by resolution without dissent, to prohibit pets in the scheme? Why or why not?**

**Do you support the existing rules relating to keeping of pets? How should the BCCM Act deal with the issue of pets?**

A total of 97 submissions provided a clear answer in relation to whether bodies corporate should be able to adopt and enforce a by-law prohibiting pets. Of those, 74 submissions supported extending this authority to the body corporate. Many of these submissions argued that a by-law prohibiting pets should be adopted by a special resolution or even a simple majority. Some argued that a body corporate should be able to prohibit new pets while 'grandfathering' in existing pets. Many argued that there should be pet friendly and pet free community titles schemes. This would mean that if a no pets by-law is in place (either as set by the original owner or as later adopted by the body corporate) then these by-laws should be enforceable.

Some submissions noted that if a lot owner or occupier moves into a scheme that contains a no pets by-law, then that by-law should be respected. It was argued that the lot owner or occupier knew, or

<sup>25</sup> A no pets by-law would not apply to guide, hearing or assistance dogs under the *Guide, Hearing and Assistance Dogs Act 2009* (Qld): BCCM Act s 181.

<sup>26</sup> *Body Corporate for River City Apartments CTS 31622 v MacGarvey* [2012] QCATA 47.

<sup>27</sup> BCCM Act s 62(3)(a). The requirements for a special resolution are set out in BCCM Act s 106.

should have known, that pets were not allowed. This would mean that before a person buys or moves into a scheme, the onus is on them to investigate whether pets are allowed at the scheme.

Some submitters commented that they gave up their pets when moving into a community titles scheme only to see other lot owners and occupiers move into the scheme, ignore the by-laws and challenge the matter with the BCCM Commissioner's office.

Some submitters commented that they expressly choose to live in a pet free building and purchased a lot based on the fact that a no pets by-law was in place. These submitters described immense frustration when subsequent owners and occupiers have moved into the scheme, bringing their pets with them and breaching the by-law.

A total of 20 submissions did not support giving bodies corporate an ability to ban pets in a community titles schemes. The RSPCA noted that Australia has one of the highest pet ownership rates in the world and argued that many animals are well suited to community titles schemes and apartment living. Further, the RSPCA noted that there are easy ways to deal with the issues associated with pet ownership in community titles schemes (using many of the same mechanisms that are used to deal with identical issues in free-standing housing).

### **2.2.1. Adopting a no pets by-law**

Many submissions argued that a resolution without dissent is nearly impossible to achieve, as it only takes one lot owner to oppose the resolution and it will fail. This, it is argued, means that the views of the majority may be held hostage to the views of a small minority or even a single owner. Despite this, and given the widespread support for granting bodies corporate an ability to prohibit pets, the Centre recommends that the BCCM Act be amended to allow this to occur.

For new schemes (those that are established after the BCCM Act is amended to grant bodies corporate an ability to prohibit pets) this will create very few issues. The original owner will set the by-laws for the scheme and decide whether or not to include a no pets by-law. Lot owners that buy into the scheme will (or should be) aware of the by-laws at the time they purchase. If, at a later date, the body corporate of the scheme decides to adopt or remove a no-pets by-law, this may be done by a resolution without dissent.

In existing schemes (those currently in existence or that are established before the legislation is amended) there may be a few more issues. No scheme will be forced to adopt a pet by-law.

A no pets by-law, if adopted by the body corporate, will not operate retrospectively. This means that any existing approvals from the body corporate allowing a lot owner or occupier to keep a pet on their lot will remain valid, even if the scheme later adopts a no pets by-law. Similarly, if a scheme does not have a by-law about pets, any lot owner or occupier who is keeping a pet before the no pets by-law is adopted will be able to keep their pet.

Existing schemes that currently have an unenforceable no pets by-law (whether approved by the body corporate or adopted by the original owner) will be required to adopt a no pets by-law by a resolution without dissent at a general meeting before the by-law will become enforceable.

Changing, amending or removing a no pets by-law will require the same type of resolution as was used to adopt the by-law. In this case, that means a resolution without dissent will be required.

A no pets by-law will not prohibit a person with a disability under the *Guide, Hearing and Assistance Dogs Act 2009* (Qld) from keeping a guide, hearing or assistance dog in a lot as these people are exempt under the BCCM Act.<sup>28</sup> Given recent amendments to the *Guide, Hearing and Assistance Dogs Act 2009* (Qld), the BCCM Act may require amendment to extend this exemption to the trainers, carers and alternative handlers of guide, hearing or assistance dogs.<sup>29</sup>

#### Recommendation 5: Pets

A by-law prohibiting the keeping of pets in a lot or on the common property should be enforceable against lot owners and occupiers if:

- the original owner includes the by-law in the schedule of by-laws attached to the first community management statement (**CMS**) for the scheme; or
- the body corporate adopts the by-law by a resolution without dissent.

Aside from this different threshold required to adopt the by-law, a no pets by-law will be added to the CMS and enforceable in the same way as any other by-law for the scheme. Amending or removing a no pets by-law will also require a resolution without dissent.

For the removal of doubt, the adoption of this recommendation will require a change to the power of the body corporate to regulate activity so that a prohibition on keeping pets is permissible and not unreasonable or oppressive.

A no pets by-law will not operate retrospectively.

## 2.3. Smoking in community titles schemes

Just as by-laws cannot prohibit the keeping of pets, by-laws cannot be used to prohibit any other activity. By-laws may provide for the regulation of the use and enjoyment of a lot<sup>30</sup> but cannot prohibit behaviour, such as smoking in a lot, on a balcony or in a courtyard even where that smoke drifts into other lots and causes an inconvenience to other lot owners or occupiers.

If the cigarette smoke creates a nuisance, the affected lot owner may have a cause of action against the smoker. However, following the decision in *Norbury v Hogan*,<sup>31</sup> cigarette smoke emanating from one lot into another is unlikely to meet the test of a nuisance at law. This has meant that to avoid smoke emanating from an adjacent lot, a non-smoker was left with no choice other than to shut their doors and windows. Many submitters felt that this is unfair and impractical, especially at night or on hot days. It was argued that the burden should be on the smoker to ensure that cigarette smoke does not emanate from their lot to other lots.

<sup>28</sup> BCCM Act s 181.

<sup>29</sup> *Guide, Hearing and Assistance Dogs Act 2009* (Qld) ss 8-9. However, a by-law that is inconsistent with the BCCM Act or another Act is invalid to the extent of the inconsistency: BCCM Act s 180(1). This means that even if s 181 of the BCCM Act is not amended to include trainers, carers and alternative handlers, these people cannot be prohibited from keeping guide, hearing or assistance dogs on a lot.

<sup>30</sup> BCCM Act s 169(1)(b)(i).

<sup>31</sup> [2010] QCATA 27.

The issue of allowing bodies corporate to ban smoking generated more controversy than any other issue raised in the Options Paper. The idea that smokers could be banned from smoking on their own lot received an incredible amount of media coverage in Australia and internationally. In some cases, this was reported as a proposed government ban on smoking in private residences. However, nothing of the sort was proposed in the Options Paper.

Rather, the discussion in the Options Paper focused on whether the body corporate should have the ability to adopt and enforce a by-law that prohibits a lot owner or occupier from smoking on their lot where that smoke drifts into an adjacent lot and causes an inconvenience to the owner or occupier of the adjacent lot.

#### **Options Paper Questions 7-8**

**Should bodies corporate have an ability to prohibit smoking on a balcony or where a structure is within four metres of another structure on an adjacent lot?**

**If not, how should bodies corporate deal with this issue?**

A total of 261 submissions addressed this question. Of these, the overwhelming majority (214 submissions) supported giving the body corporate the authority to adopt and enforce a by-law prohibiting smoking on a lot where the smoke drifts from the lot to an adjacent lot. The most commonly cited reason is that the smoke generated in the smoker's lot does not remain in the smoker's lot but enters adjacent lots, permeating into carpets, curtains, clothing and furniture.

It was argued that the non-smoker should not be subjected to the second hand smoke from the smoker. Many submissions commented that smokers will often close the doors and windows of their own lot when smoking on the balcony or courtyard (thus ensuring the smoke does not drift back inside their lot). The Cancer Council and a range of other anti-smoking groups made submissions in support of granting the body corporate the power to prohibit smoking on a lot as this will reduce exposure to toxic chemicals contained in second hand smoke.

43 submissions argued against extending this authority to the body corporate. The most commonly cited reason was that cigarette smoking is legal and what a person does in their own home is nobody else's concern. Several submissions noted that unless smoking is made illegal, the body corporate should not have a power to ban it. Others argued that the by-law will be very difficult to enforce.

Some submissions argued that the body corporate should only be able to prohibit smoking on a lot when a complaint has been made or where there is a demonstrated problem with cigarette smoke drift. Other submissions argued that the by-law should also cover barbeque smoke and cooking smells emanating from one lot to another. Some submissions argued that a non-smoking by-law should only apply to newly constructed buildings. Others argued that it should only apply where the body corporate provides a designated smoking area on common property.

As mentioned above, some of the media coverage presented this issue as a proposed government ban on smoking when in actual fact a government imposed ban on smoking in community titles schemes was never discussed in the Options Paper. The issue with smoking (as with pets) is about whether a

body corporate should have the right to decide to prohibit particular behaviour and then enforce that decision.

A number of the submissions that opposed giving this power to the body corporate framed their dissent in terms of what was perceived as a blanket ban on smoking. There would not be any obligation on a body corporate to adopt a no smoking by-law. It may be possible for a body corporate to adopt a by-law that prohibits smoking for some lots but not for others, for example prohibiting smoking on lower levels, but not on top floor apartments.

There is a view that the lot owners within the scheme should be able to decide what rules to impose on the community and this includes behaviours that are allowed and behaviours that are prohibited. Even British American Tobacco commented in its submission that it supports the right of owners and bodies corporate to decide whether homes are smoke-free or not.<sup>32</sup>

Despite the argument of a potential infringement of individual rights, there seems to be very little reason not to allow bodies corporate to pass and enforce a no smoking by-law if that by-law is supported by the body corporate. As with a no pets by-law, the BCCM Act will have to be amended to allow a by-law to prohibit smoking. The Centre recommends that for existing schemes, a no smoking by-law should require a resolution without dissent to be adopted, amended or removed.

#### **Recommendation 6 – Smoking**

A by-law prohibiting smoking in an outdoor area that is part of a lot (including balconies, courtyards, etc) or on common property (including common property subject to an exclusive use by-law) should be enforceable against lot owners and occupiers if:

- the original owner includes the by-law in the schedule of by-laws attached to the first CMS for the scheme; or
- the body corporate adopts the by-law by a resolution without dissent.

Aside from this different threshold required to adopt the by-law, a no smoking by-law will be added to the CMS and enforceable in the same way as any other by-law for the scheme. Amending or removing a no smoking by-law will also require a resolution without dissent.

For the removal of doubt, the adoption of this recommendation will require a change to the power of the body corporate to regulate activity so that prohibition on smoking in an outdoor area that is part of a lot or on common property where that smoke drifts to an adjacent lot is permissible and not unreasonable or oppressive.

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<sup>32</sup> Note, however that British American Tobacco did not support tobacco specific by-laws but did comment that the real issue is the enforceability of appropriate resolutions.

## 2.4. Overcrowding

### Options Paper Questions 9-10

**If there are reasonable grounds to believe that a lot is overcrowded, should the body corporate have the authority to give consent, on behalf of the lot occupier, for the local council or fire services to investigate the suspected overcrowding?**

**Which option do you support and why? If you do not support any of the options, how would you deal with this issue?**

Overcrowding of lots is an issue that can affect schemes in holiday destinations such as the Gold and Sunshine Coasts, schemes in backpacker areas, city centres and near universities. Usually, the overcrowding of the lot is for a short time, such as during Schoolies. Overcrowding may also result if lot owners or occupiers use services such as Airbnb to lease rooms or their entire lot as short term 'party' accommodation for bucks parties and other events.

Many schemes never have to deal with overcrowding of lots, which may be why only 48 submissions addressed these questions. Of these, the vast majority (34 total submissions) were in favour of granting the body corporate the ability to consent on behalf of a lot owner or occupier to an inspection by the fire service or a local council.

Some submissions supported the Tasmanian approach (which gives an authorised person a right of entry to a lot after reasonable notice if, on reasonable grounds, it is believed that a breach of the by-laws has been or is being committed). However, other submissions cautioned against giving a body corporate a general right of entry as this may be abused in disputes between lot owners and the body corporate. It was suggested that the body corporate should have a clear authority to report suspected overcrowding to the relevant authorities.

Arguably, the body corporate already has the ability to refer suspected overcrowding to a local council or the fire service (a **relevant authority**). The local council may have an ability to investigate suspected overcrowding as a breach of the relevant development approval<sup>33</sup> or to refer the matter for an investigation as a fire safety risk. However, fire safety investigations require the consent of an occupier<sup>34</sup> or a warrant.

When investigating the complaint, the relevant authority may seek the lot occupier's permission to enter the lot. If the occupier of the lot does not consent, the relevant authority may be unable or unwilling to take further steps to investigate.

The Centre considers that any power of entry into a lot to investigate overcrowding should be exercised by the relevant authority and not by the body corporate. The role of the body corporate

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<sup>33</sup> An authorised person has the ability to enter property in particular circumstances, such as to find out whether the conditions of an approval have been complied with: *Local Government Act 2009* (Qld) s 132(1)(c). BCCM Act s 316 – a local government authorised under an Act to enter a lot may also enter the common property.

<sup>34</sup> *Fire and Emergency Services Act 1990* (Qld) s 60J.



should be to report suspected overcrowding and to facilitate the investigation of the complaint by the relevant authority.

If the lot occupier is unavailable or unwilling to consent to an inspection by the relevant authority, there should be a further step that the body corporate may take to protect the safety and amenity of lot occupiers and the common property. Where the body corporate believes on reasonable grounds that the lot is overcrowded, the body corporate should be able to decide, by ordinary resolution, to give consent on behalf of the occupier of the lot to an inspection of the lot by the relevant authority.

A consent given by the body corporate should require a resolution where there is at least reasonable evidence of overcrowding. This recommendation may require an amendment to the *Local Government Act 2009* (Qld) or the *Fire and Emergency Services Act 1990* (Qld) to provide that a consent given by the body corporate is deemed to be the consent of the lot occupier.

#### **Recommendation 7 - Overcrowding**

Where overcrowding of a lot is suspected on reasonable grounds, the body corporate should have the authority to report the matter to the local council or the fire service (a **relevant authority**).

If the relevant authority is unable to obtain consent from the lot occupier to enter the lot to investigate the overcrowding, the body corporate should be able to approve a resolution giving consent on behalf of the occupier of a lot, for the lot to be inspected by the relevant authority to determine whether the lot is overcrowded.

## **2.5. Other by-laws enforcement mechanisms**

The discussion of by-laws in the Options Paper focused on identifying improvements to the existing enforcement mechanisms by considering specific issues. In addition the Options Paper also considered a range of mechanisms to improve the overall enforcement of by-laws generally.

### **2.5.1. Schedule of standard by-laws in BCCM Act**

#### **Options Paper Question 11**

**What issues should be covered by the by-laws in schedule 4 of the BCCM Act?**

The Options Paper considered whether the standard by-laws in schedule 4 of the BCCM Act are sufficient. Schedule 4 does not apply to schemes by default and will only apply if there are no by-laws in the CMS for the scheme.<sup>35</sup>

Of the submissions that responded to this question, many felt that the standard by-laws in schedule 4 should include by-laws related to parking and towing, smoking and pets. Several submissions commented that schedule 4 should include an internal dispute resolution by-law. Generally, the

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<sup>35</sup> BCCM Act s 169 and schedule 4.

submissions supported the proposition that the standard by-laws in schedule 4 should be valid and enforceable if adopted by the body corporate.

If the recommendations relating to towing, pets and smoking are adopted it becomes particularly important that there are easily accessible examples of well written by-laws which are valid and enforceable. Schedule 4 provides well written by-laws that can be adopted by the body corporate. It is understood that some schemes will use schedule 4 as a starting point when drafting their own by-laws. Other schemes may seek to simply adopt the relevant by-law from schedule 4 word for word.

However, the by-laws in schedule 4 are not merely examples. They are real by-laws that are applicable at some schemes (albeit only in a small number of schemes that do not have by-laws in the scheme's CMS). Given this, it would be inappropriate for schedule 4 to contain example by-laws.

However, the BCCM Act could contain example by-laws in some other location. This could be in a new schedule, in the part of the Act that deals with a particular topic, or in the regulations. The legislation could provide that if an example by-law is adopted by a scheme, it is a valid and enforceable by-law that is not oppressive or unreasonable.

The Centre recommends that the BCCM Act should contain example by-laws that cover topics including internal dispute resolution, parking and towing, pets and smoking. It is further recommended that the BCCM Act should provide that if a body corporate adopts an example by-law from the Act, then the by-law is valid and enforceable.

#### **Recommendation 8 – Standard by-laws**

The BCCM Act should be updated to include example by-laws that cover specific topics including internal dispute resolution, parking and towing, pets and smoking.

The BCCM Act should provide that if a scheme adopts an example by-law then that by-law is valid and enforceable.

### **2.5.2. Default application of standard by-laws**

#### **Options Paper Question 12**

**If the by-laws for a scheme are silent about an issue that is covered by the by-laws in schedule 4 of the BCCM Act, should the relevant schedule 4 by-law apply by default?**

Of the 48 submissions that addressed this question, 32 supported this idea and 12 were against it. Significantly however, both the UOAQ and the OCN (key groups representing lot owners), the SCA and ARAMA were opposed. Several lawyers who work in body corporate law were also opposed.

The main reason for opposing the default application of the standard by-laws is that it would create confusion as to what by-laws actually apply in a scheme because the by-laws could potentially be recorded in more than one place. The by-laws in the CMS would have to be considered in light of the by-laws in the BCCM Act to determine the actual scope of the by-laws. This could be very difficult for

lot owners and occupiers who do not have legal training. It may mean that the average lot occupier could not be certain what by-laws actually apply to the scheme which would make compliance difficult.

While there was support for the default application of the by-laws in schedule 4, the fact that key industry groups and body corporate lawyers are opposed means that the problems that could be created by this change may outweigh any benefit. Given this, the Centre does not support this change at this time.

#### **Recommendation 9 – Default application of standard by-laws**

There should be no change in the application of the by-laws in schedule 4 of the BCCM Act.

### **2.5.3. By-laws as a deemed agreement**

#### **Options Paper Question 13**

**Should the by-laws for a community titles scheme be deemed to be an agreement signed and sealed by each of the body corporate, owners, occupiers and mortgagees from time to time?**

This question was addressed by 56 submissions. Of those, 53 were supportive of amending the BCCM Act to provide that the by-laws be deemed to be an agreement signed and sealed by each of the body corporate, owners, occupiers, and mortgagees from time to time.

The BCCM Act provides that the CMS is binding on the body corporate, lot owners, registered proprietors and lot occupiers as if it included mutual covenants to observe its provisions and had been signed under seal.<sup>36</sup> The by-laws for a scheme are generally included in the CMS, which by extension, makes the by-laws binding on the body corporate, lot owners and occupiers.

The Centre recognises that a change such as that suggested by the question will have little or no actual effect in the enforceability of by-laws in Queensland. However, it will make clear the obligation to comply with the by-laws and put all lot owners and occupiers on notice. This is particularly important if some of the other recommendations in this paper are adopted. For example, if the body corporate is granted authority to tow vehicles, to prohibit pets and smoking and to levy fines for breach of the by-laws (discussed at paragraph 2.5.4 below) lot owners and occupiers will need to be aware of this and should be encouraged to take more notice of the by-laws and the extent to which by-laws are enforceable.

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<sup>36</sup> BCCM Act s 59(3).

The CMS is not included in the existing seller disclosure regime in Queensland<sup>37</sup> and even though the by-laws are deemed to be terms of a standard tenancy agreement,<sup>38</sup> they are not always given to tenants. This means that some lot owners and occupiers may be genuinely ignorant of the by-laws. This however, should not be an excuse for failing to comply with the obligations contained in the by-laws. The issue is one of increasing awareness of the fact that compliance with the by-laws is mandatory.

One method to address this lack of knowledge is to deem the by-laws to be an agreement signed under seal. This will create a greater onus on real estate agents and rental agents to ensure that prospective purchasers and tenants are aware of the by-laws before buying or moving into a scheme. However, such a change would not make the by-laws more enforceable and in this respect, it would be a largely symbolic change.

A second method to increase this lack of knowledge is to ensure that the by-laws are adequately disclosed to prospective purchasers and tenants and readily available for existing lot owners and occupiers. The binding nature of the by-laws justifies the minor increase in paperwork and red tape that will result from requiring increased disclosure.

The Centre recommends that both of these methods be pursued to increase compliance with the by-laws.

#### **Recommendation 10 – By-laws to form a greater part of pre-purchase disclosure**

The by-laws for a scheme should be included in the disclosure regime for every sale of a lot in that scheme. The by-laws for a scheme should be given to each tenant of a lot in a scheme when that tenant enters into a lease of the lot.

The BCCM Act should expressly deem the by-laws to have effect as a binding agreement executed between each of the body corporate, lot owners, tenants and mortgagees from time to time.

### **2.5.4. Fines for breach of by-laws**

#### **Options Paper Question 14**

**Should Queensland adopt a version of the South Australian Model and allow bodies corporate to fine lot owners and occupiers who, after receiving a contravention notice, continue to breach or fail to comply with the by-laws?**

Nearly 70 submissions addressed the question of whether the body corporate should have the ability to issue monetary fines against lot owners and occupiers for continued breach of the by-laws. Of

<sup>37</sup> Seller disclosure obligations in relation to by-laws and the community management statement were considered in *Issues Paper 1: Seller Disclosure in Queensland*, available at <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-property-law-in-queensland>.

<sup>38</sup> *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss 52(2) and 69.

these, 49 submissions supported this option while 16 were opposed. A further four submissions felt that fines should be available in limited circumstances.

The main reason for opposing the use of fines by the body corporate is that it is likely to exacerbate disputes and can potentially be abused by an unreasonable body corporate committee. Several submissions argued that fines should only be imposed by an impartial third party such as a magistrate or the BCCM Commissioner.<sup>39</sup>

Some submissions commented that no smoking by-laws should be enforced by a monetary penalty for repeat offenders. Many submitters who supported the use of fines also felt that fines should only be used after a contravention notice has been given and only where there is continued breach or failure to comply with the by-laws.

The SCA noted that fines are already available under the BCCM Act but the penalty is imposed by the Magistrates Court under the *Justices Act 1886* (Qld). However, they argued that the process is onerous, costly, difficult to access and rarely used. The OCN argued that fines should not be imposed by a body corporate but that this power should be granted to an adjudicator. ARAMA supported giving the body corporate the ability to issue a fine provided it is used at the end of the by-law enforcement process (after there has been non-compliance with a contravention notice).

The SCA submitted that the body corporate or adjudicators should be able to impose a fine on lot owners and occupiers and that the penalty should be payable to the body corporate. It was suggested that the penalty be subject to a statutory cap and given using a prescribed form which lists the appeal rights for the person receiving the fine. The decision to impose a fine would be made by the body corporate and generally, by the committee. The fine would be subject to penalty interest if unpaid or undisputed after a set period of time and could be recovered from a lot owner in the same manner as unpaid contributions. The OCN and ARAMA generally supported the SCA position.

Given the strong industry support for this option, the Centre recommends that the BCCM Act should be amended to allow the body corporate to impose a monetary fine<sup>40</sup> on lot owners and occupiers who continue to breach a by-law after being given a contravention notice.

#### **2.5.4.1. The features of a power to fine**

Any authority given to the body corporate to issue fines for a breach of by-laws must be limited and restricted in its application to minimise the potential for abuse.

It will be necessary that the body corporate adopt a by-law authorising fines for breach of certain by-laws as this will allow the body corporate in a general meeting to decide whether it wants to issue fines and whether to give this authority to the committee. The existence of a by-law allowing fines will also put lot owners and tenants on notice that breach of the by-laws may attract a fine.

A fine should only be an option for breaches of particular types of by-laws. Other by-law disputes should continue to use the existing procedure. For example, a by-law prohibiting lot owners and occupiers from hanging washing out where it is visible from another lot should not be dealt with by a

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<sup>39</sup> Under the existing legislation, the BCCM Commissioner does not have authority to issue fines or even to enforce adjudicator's orders.

<sup>40</sup> This is currently prohibited by BCCM Act s 180(6).

fine. A by-law prohibiting renovations without approval of the body corporate is also not appropriate for a fine.

Fines should only be used where breach of a by-law is caused by repetitive behaviour that impacts the amenity of other users in the scheme. Fines should only be issued for persistent noncompliance with the relevant by-laws. For example, a one-off party on a Friday or Saturday night that results in excessive noise should not attract a fine (although any complaints could be made directly to the lot occupiers and the body corporate may decide to issue a contravention notice depending on the nature of the disturbance). Excessive noise and loud parties every night or every weekend after a contravention notice has been issued could attract a fine.

A person who has been issued a fine should have a right to contest the fine using the dispute resolution services of the BCCM Commissioner. An adjudicator should have the authority to dismiss the fine if the breach is trivial or trifling in the circumstances.

A Queensland version of the South Australia Model<sup>41</sup> should include the following characteristics:

- the body corporate must adopt a by-law authorising the use of fines where a lot owner or occupier has continued to contravene specified by-laws after receiving a contravention notice;
- the by-law can authorise fines up to a maximum of two penalty units<sup>42</sup> which will be paid directly to the body corporate;
- a decision to issue a fine must be made by the body corporate or the committee;
- a fine can only be issued after a contravention notice has been given and there has been further non-compliance with the by-law;
- the fine that is issued must use a prescribed form that lists important details including :
  - the date the by-law contravention notice was issued;
  - the date of the further contravention that incurs the fine;
  - a description of the details surrounding the further contravention;
  - the amount of the fine;
  - how to pay the amount;
  - when the amount must be paid;
  - what happens if the amount is unpaid (i.e. that the body corporate may recover the unpaid amount as a debt and penalty interest may accrue);
  - the rights the lot owner or occupier has to dispute the fine;
- where a fine is issued to a tenant or lessee of a lot who is not the lot owner, the lot owner will be given notice of the fine;
- fines that are unpaid or undisputed within 30 days after being received will become a body corporate debt on the lot and may be subject to penalty interest (if the body corporate has decided to charge a penalty for fines). The body corporate may recover the fine, any penalty and recovery costs reasonably incurred by the body corporate as if they were unpaid contributions;

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<sup>41</sup> *Community Titles Act 1996* (SA) s 34(3)(e); *Strata Titles Act 1988* (SA) s 19(3a). The South Australian Model was discussed in the Options Paper at pp 32-34.

<sup>42</sup> Currently, \$121.90: *Penalties and Sentences Act 1992* (Qld) ss 5-5A; *Penalties and Sentences Regulation 2015* (Qld) s 3 as amended by *Penalties and Sentences Amendment Regulation (No 1) 2016* (Qld) s 4.

- where the tenant fails to pay the fine and it becomes a body corporate debt on the lot, the lot owner (or its agent) will be able to recover the amount of the fine and any penalty or recovery costs from the tenant.

If a tenant or lessee of a lot is issued with a fine and the fine remains unpaid, the body corporate may have little ability to collect from the tenant. The lot owner, on the other hand, will have a lease agreement in place with the tenant. The by-laws of a scheme are taken to be terms of a lease agreement<sup>43</sup> and a copy of the by-laws must be given to the tenants.<sup>44</sup>

If the tenant does not pay the fine, this could leave the lot owner in a difficult position. A lot owner who owes a body corporate debt is not allowed to vote on most matters at a general meeting and may not nominate for a committee position.<sup>45</sup> However, the recommendations call for the lot owner to be notified if a tenant is given a fine. This will give the lot owner the opportunity to ensure that the fine is paid or disputed before the 30 day timeframe so that it will not become a body corporate debt.

In the event that a body corporate debt does eventuate, the lot owner should be able to recover the amount of the debt from the tenant. The lot owner has a contractual relationship with the tenant and is well placed to withhold the amount of the fine from any payment of rent. The implementation of this option may require an amendment to the standard terms of a rental agreement contained in the rental tenancies legislation.<sup>46</sup>

#### **Recommendation 11 – Fines for breach of by-laws**

The BCCM Act should allow bodies corporate to issue a fine of up to two penalty units to lot owners and occupiers who continue to breach particular by-laws after receiving a contravention notice.

The ability to issue fines will not be automatic. The body corporate in a general meeting must approve a by-law authorising the imposition of fines for breach of particular by-laws before any fines can be issued.

The fine must be given using a prescribed form and cannot exceed a statutory maximum amount of two penalty units. The fine should be paid to the body corporate.

The accused person must have the ability to dispute the fine through the BCCM Commissioner's office and the onus of proving that the breach occurred will rest with the body corporate.

Fines that are not paid or disputed within 30 days after being issued will become a body corporate debt on the lot, recoverable by the body corporate using the debt recovery mechanisms provided in the BCCM Act for unpaid contributions.

If a fine incurred by a tenant is unpaid, the body corporate may recover the fine from the lot owner. The lot owner may recover the amount from the tenant as a debt.

<sup>43</sup> *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 52(2); a copy of the by-laws must be given to the tenants.

<sup>44</sup> *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 69.

<sup>45</sup> See for example, *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) (**Standard Module**) s 10(2)(d), 84(2).

<sup>46</sup> *Residential Tenancies and Rooming Accommodation Regulation 2009* (Qld) sch 1, part 2.

## 2.5.5. Delegation of by-law enforcement

### Options Paper Question 15

**Should bodies corporate have the ability to authorise a resident manager, body corporate manager or a single executive committee member to issue on-the-spot contravention notices to owners and occupiers who contravene or fail to comply with the by-laws?**

The question of allowing the body corporate to delegate a power to issue contravention notices was one of the most evenly split issues. Of 57 submissions that addressed this question, 28 supported giving the body corporate this ability and 29 were against.

Some submissions misunderstood the question to be referring to delegation of a power to issue on-the-spot fines. The decision to issue a fine to a lot owner or occupier must always be a decision of the body corporate.

Arguably, if a contravention notice could be issued on-the-spot, there is a stronger connection between the conduct and the contravention notice. The idea is that a simple warning may not be enough to change behaviour that is flagrantly violating a by-law. The time it takes to get a committee vote to issue a contravention notice may be an obstacle when seeking to address an immediate concern.<sup>47</sup>

The main strata industry groups, the OCN, the UOAQ, the SCA and ARAMA were all opposed to allowing the body corporate to delegate the authority to issue contravention notices. It was argued that the current system of issuing contravention notices by a committee decision is sufficient.

Given the lack of industry support, the Centre does not support this change at this time.

### Recommendation 12 – Delegation of enforcement

The body corporate should not be given the ability to delegate a power to issue contravention notices. There should be no change to the current position in this regard.

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<sup>47</sup> Even though a decision to issue a contravention notice may be made by a vote outside a committee meeting (for example, by email), there will inevitably be a delay between the conduct and the issuing of the contravention notice.



### 3. Debt recovery

The issue of body corporate debt and the mechanisms the body corporate has at its disposal to recover outstanding amounts are extremely important in community titles schemes. If one lot owner does not pay their contributions, they are effectively borrowing from the other lot owners, who must fund the shortfall or do without important services.

The body corporate does have mechanisms to recover the unpaid contributions from lot owners as a debt. However, the amounts spent to recover the unpaid contributions (**recovery costs**) may significantly increase the total amount of debt owed by the lot owner. For example, in *Westpac v Wave*<sup>48</sup> the body corporate spent hundreds of thousands of dollars in recovery costs to recover what was initially a small amount of unpaid contributions. That decision and *399 Woolcock*<sup>49</sup> are authority for the proposition that reasonably incurred recovery costs are a 'body corporate debt' for the purposes of the relevant Regulation Module.<sup>50</sup> It remains unclear whether this means the recovery costs can be added to the unpaid amount and billed to the lot owner without having to go to court (in which case it is a liquidated debt) or whether the recovery costs cannot be added to the unpaid amount without a court order (in which case it is an unliquidated debt).

The Options Paper considered a range of options to improve the ability of the body corporate to recover unpaid contributions, recovery costs and other amounts from lot owners as a debt. These are discussed further below and include options such as: introducing a scale of costs for debt recovery actions; making body corporate debt into a charge on the lot; changing the requirements in relation to an address for service; and the giving the body corporate an express ability to garnishee rental income from a landlord or rental agent.

There are good reasons to improve the ability of a body corporate to collect unpaid amounts. First, it may reduce the amount of money that the body corporate spends to recover debts from defaulting lot owners. This protects other lot owners (who have to make up any shortfall in the body corporate budgets) and defaulting lot owners (who are liable to pay the recovery costs) by keeping the recovery costs low. Additionally, it provides certainty for the body corporate that it will be able to fund its ongoing obligations.

#### 3.1. Scale of costs

It has been suggested that a scale of costs for debt recovery actions could allow the body corporate to add the recovery costs to the outstanding amount without the need to go to court. Recovery costs in accordance with a scale should be deemed reasonable recovery costs. This will allow the body corporate to add the amounts from the scale to the total debt owed by the lot owner.

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<sup>48</sup> *Westpac Banking Corporation v Body Corporate for the Wave Community Title Scheme* 36237 [2014] QCA 73.

<sup>49</sup> *The Body Corporate for 399 Woolcock Street CTS 34700 v Sexton* [2013] QCATA 55.

<sup>50</sup> Standard Module s 145; *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) (**Accommodation Module**) s143; *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) (**Commercial Module**) s 104. The other Regulation Modules are: *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld) (**Small Schemes Module**); and *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011* (Qld) (**Two-lot Module**).

### Options Paper Question 16

**Should the BCCM Act specify a scale of costs for debt recovery actions taken by the body corporate to collect unpaid contributions and penalty interest?**

A total of 52 submissions addressed this question. Of those, 41 supported a scale of costs and two others gave conditional support. Only nine submissions were against a scale of costs. Several submissions did not support a scale because they felt it would mean that the body corporate would end up out of pocket and unable to recover the amounts it actually spent. This was based on a perception that the amounts in the scale would represent only about 75-80% of the actual cost charged to the body corporate by the debt recovery company. The shortfall would be paid by the non-defaulting lot owners. Presumably, some of these submissions would support the scale if it meant that the body corporate did not end up out of pocket.

Others did not support a scale as they felt the existing 'reasonably incurred' requirement is sufficient.<sup>51</sup> However, a scale of costs could work with the 'reasonably incurred' requirement as the scale could prescribe amounts that are deemed to be reasonable if incurred. A body corporate could charge the lot owner the scale price for debt recovery and rely on the scale as being 'reasonable'. If the initial debt recovery efforts are not sufficient, the body corporate could then seek recovery through the court.

If court action to recover the unpaid contributions, penalty interest and recovery costs became necessary, the scale would apply to all debt recovery actions taken by the body corporate prior to commencing legal proceedings. Recovery costs incurred after commencing legal proceedings would be determined in the usual way through the courts in accordance with that court's procedures.

Of the submissions that support a scale of costs for debt recovery actions, many argued it will create certainty for lot owners regarding what they could expect to be charged if they do not pay their contributions. It was argued that a scale would protect defaulting lot owners from unscrupulous debt collectors who might inflate the costs of debt recovery. Additionally, a scale will allow a defaulting lot owner, or subsequent owner who may become liable for the body corporate debt,<sup>52</sup> to easily determine if the costs being charged for debt recovery are reasonable.

The UOAQ supports an approach that recognises that the body corporate has a right to recovery costs without proceedings in a court or tribunal. The SCA submitted that the scale should provide the maximum claimable costs as a fixed fee for certain actions, regardless of whether the action is performed by the body corporate, the body corporate manager or a debt collection agency.

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<sup>51</sup> The Regulation Modules define body corporate debt to include recovery costs 'reasonably incurred' in recovering the unpaid contribution or penalty interest: Standard Module s 145(1)(c); Accommodation Module s 143(1)(c); Commercial Module s 104(1)(c); Small Schemes Module s 79(1)(c). Two-lot Module s 27(2)(b)(iii) (note the Two-lot Module does not use the term 'body corporate debt', but the effect of the provision is the same).

<sup>52</sup> Standard Modules s 145(3); Accommodation Module s 143(3); Commercial Module s 104(3); Small Schemes Module s 79(3); Two-lot Module s 27(5).

One limitation of a scale of costs in the BCCM Act is that it can only be binding on bodies corporate. A scale of costs will set the maximum amount that a body corporate can charge a lot owner for debt recovery actions. Presumably, the body corporate will then be inclined to use debt recovery agencies, body corporate managers and solicitors that charge the scale to the body corporate. Otherwise, the body corporate may be left out of pocket.

A scale of costs was supported by the OCN, ARAMA, SCA, and the PCA.

#### **Recommendation 13 – Scale of costs**

The BCCM Act should provide an itemised scale of costs for debt recovery actions taken by or on behalf of the body corporate to recover unpaid contributions and penalty interest from defaulting lot owners. The scale should apply to debt recovery actions taken prior to the commencement of legal proceedings (if any).

Costs incurred in recovery of body corporate debt after the commencement of legal proceedings should continue to be determined by a court in accordance with its usual procedures. The ‘reasonably incurred’ test will continue to apply to such applications.

### **3.2. Items included in a scale of costs for debt recovery**

#### **Options Paper Question 17**

**Aside from legal costs allowable under the UCPR, what items should be included in a scale of costs for debt recovery? Should there be fixed charges for certain items or monetary limits imposed depending upon the size of the debt?**

Most submissions on this question argued that the scale of costs should not limit the recovery costs that a body corporate can recover. It was argued that the scale should include all costs incurred by the body corporate to recover unpaid contributions. Some submissions noted that it costs the same to pursue large debts as it does small debts so limiting the recovery costs to a percentage of the debt may leave the body corporate out of pocket for some recovery costs.

One submission argued that recovery costs should be capped with one cap applying to undefended debt recovery matters and another for defended debt recovery matters. However, any cap on the amount of recovery costs will inevitably leave the body corporate out of pocket and put a burden on the non-defaulting lot owners. At the earliest stages of debt recovery, it is not possible to determine whether the matter will be defended. Further, the cost of arrears notices and letters of demand does not change based on whether the debt is being defended or not. Bodies corporate will only be able to recover an amount that has been spent which means that costs for defended matters will be more than costs for undefended matters.

The OCN submitted that all cost items related to debt recovery should be included. They also submitted that there should be no monetary limits based on the size of the debt but limits based on the amount of time (in hours of work) to recover the debt.

As discussed, a scale in the BCCM Act can only be binding on the body corporate. It is arguable that if a scale is implemented, debt collectors and body corporate managers may voluntarily adhere to the scale. Bodies corporate will be more likely to use those managers and debt collectors who adhere to the scale and presumably, over time many are likely to adopt the scale.

Generally, there was agreement that a scale should cover items such as arrears notices, letters of demand and the costs of entering into and monitoring payment plans and instructing debt collectors or solicitors prior to commencing legal action.

Obviously, a scale must be designed in consultation with costs assessors, debt collectors and body corporate managers. The items included in the scale and the amounts claimable for those items should be determined in consultation with debt recovery experts, community titles industry groups and qualified costs assessors.

The scale is to apply to all debt recovery actions taken by or on behalf of the body corporate. Where the body corporate commences legal proceedings to recover unpaid amounts, the costs of those proceedings and further recovery efforts will be outside the scale and should be determined by the court as in accordance with the court's usual procedures.

#### **Recommendation 14 – Items in a scale of costs**

The scale of costs should be binding on bodies corporate. The scale should prescribe maximum amounts that can be charged by the body corporate to lot owners for debt recovery items such as:

- arrears notices;
- letters of demand;
- negotiating and monitoring compliance with a payment plan; and
- legal costs.

The amount of the scale and the other items to be included should be determined based on consultation with community titles industry groups and qualified costs assessors.

### **3.3. Definition of body corporate debt**

In the Regulation Modules, a body corporate debt is defined<sup>53</sup> as an amount owed by a lot owner for a contribution, a penalty for not paying a contribution or another amount associated with ownership of a lot. The *Westpac v Wave*<sup>54</sup> decision confirmed that 'other amounts' include recovery costs reasonably incurred by the body corporate in recovering an amount. It was also confirmed that these other amounts are enforceable against a mortgagee in possession. *399 Woolcock Street*<sup>55</sup> confirmed that a judgment against a previous owner (for unpaid contributions, penalty interest and recovery costs) is enforceable against a subsequent owner as a body corporate debt.

<sup>53</sup> Accommodation Module s 143(1); Standard Module s 145(1); Commercial Module s 104(1); Small Schemes Module s 79(1); Two-Lot Module s 27(2)(b). The definition is found in the schedule of each module (definition of 'body corporate debt').

<sup>54</sup> *Westpac Banking Corporation v Body Corporate for the Wave Community Title Scheme* 36237 [2014] QCA 73.

<sup>55</sup> *399 Woolcock Street* [2012] QBCCMCmr 134.

Taken together, these two decisions mean that the phrase ‘body corporate debt’ impliedly includes recovery costs and judgments. However, there have been a number of calls from industry groups to amend the BCCM Act to clarify this with express language.

#### **Options Paper Question 18**

**Should the definition of ‘body corporate debt’ in the Regulation Modules be amended to specifically include recovery costs and judgments?**

Of 52 submissions that addressed this question, there were none that opposed this amendment. Two submissions gave qualified support. ARAMA argued that recovery costs should not become a body corporate debt until 30 days after notice of the costs have been given to the lot owner, or if the recovery costs are disputed, after the dispute is determined. Further, ARAMA argued that if the body corporate debt relates only to disputed recovery costs, the lot owner should not lose voting rights<sup>56</sup> and rights to nominate for a committee position (as occurs when the lot owner owes a body corporate debt).<sup>57</sup>

The Westpac Group supported amending the definition of body corporate debt but in a way that specifically refers to a lot owner’s obligation to pay these amounts. Westpac argued that a mortgagee’s liability should specifically exclude recovery costs and any component of a judgment debt that relates to recovery costs because the mortgagee may not be aware that the lot owner has unpaid contributions and that recovery costs are being accrued. Even if aware, the mortgagee may not be able to step in and pay the unpaid contributions or recovery costs or take any action to limit the recovery costs being accrued. Further, the Westpac Group argued, the mortgagee is not a party to any legal proceedings against the lot owner to recover unpaid contributions and therefore the mortgagee cannot stop these legal costs from blowing out. It is unfair, in these circumstances, to make the mortgagee liable for the recovery costs incurred by the defaulting lot owner.

There is strong support for amending the definition of body corporate debt to include recovery costs and judgment debts. However, there are also valid reasons for providing safeguards for lot owners and mortgagees in relation to body corporate debt.

Firstly, lot owners must have the ability to dispute any recovery costs being charged for recovering unpaid contributions by lodging a dispute with the body corporate.<sup>58</sup> A scale of costs for debt recovery items will allow a lot owner to determine if the recovery costs are reasonable or not. If the charges

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<sup>56</sup> A person cannot exercise a vote for a lot on a motion (except for a motion requiring a resolution without dissent) or choosing a committee member if the lot owner owes a body corporate debt: Standard Module s 84(2); Accommodation Module s 82(2); Commercial Module s 51(2); Small Schemes Module s 45(2).

<sup>57</sup> A lot owner otherwise eligible to be a voting member of the committee is ineligible to be a voting member or nominate someone to be a voting member if the person owes a body corporate debt at the time voting members are chosen: Standard Module s 10(2)(d); Accommodation Module s 11(2)(d); Commercial Module s 11(2)(c); Small Schemes Module s 11(2)(c).

<sup>58</sup> The levy notice or invoice sent to the lot owner may require a detailed breakdown of the recovery costs and should include information as to how the lot owner may dispute the charges, for example by contacting the secretary, treasurer or body corporate manager.

to the lot owner are not in accordance with the scale, the lot owner should be able to dispute the amounts. A body corporate should not charge above the scale.

Secondly, lot owners who have unpaid body corporate debt at the time of a general meeting forfeit their right to vote on most matters decided by the body corporate and their right to nominate for committee positions.<sup>59</sup> Given this, if a body corporate debt relates only to recovery costs that are unpaid and which are the subject of a dispute with the body corporate (which has not been determined), the lot owner should not lose their voting or nominating rights.

Thirdly, subsequent owners and mortgagees in possession of a lot become liable for any body corporate debt on the lot even if the debt was incurred before the new owner or mortgagee took possession.<sup>60</sup> Given this, mortgagees should be given notice when a lot owner is issued a letter of demand for unpaid contributions and recovery costs. This will put mortgagees on notice well before any costly legal proceedings are taken. Of course, this will require that mortgagees name and contact details are given to the body corporate and kept on the body corporate roll, something which is not currently required.<sup>61</sup> Subsequent lot owners can avoid liability for unpaid body corporate debt and recovery costs through adequate due diligence prior to purchasing the lot and under the recommendation for a charge (discussed below at 3.5 below).

#### **Recommendation 15 – Definition of body corporate debt**

The definition of ‘body corporate debt’ should be amended to specifically include recovery costs in accordance with the scale and judgment debts. Recovery costs that are not disputed with the body corporate within 60 days after notice is given to the lot owner will become a body corporate debt on the lot.

The contact details of a mortgagee of a lot must be notified to the body corporate and kept on the body corporate rolls. When a lot owner is issued a demand for a body corporate debt, a copy of the notice must be sent to the mortgagee at the address listed in the body corporate roll.

If the body corporate debt owed by a lot owner relates only to recovery costs that are subject to a dispute which has been lodged with the body corporate, the lot owner should not forfeit the right to vote at a general meeting or to nominate for a committee position.

### **3.4. Power of sale for bodies corporate**

Industry consultation identified the unsecured nature of body corporate debt as a key area of uncertainty facing bodies corporate in relation to unpaid contributions. In the Options Paper, this was

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<sup>59</sup> See, for example, Standard Module s 17(4) and s 84(2).

<sup>60</sup> Accommodation Module s 143(1); Standard Module s 145(1); Commercial Module s 104(1); Small Schemes Module s 79(1); Two-Lot Module s 27(2)(b).

<sup>61</sup> Under the relevant Regulation Module, lot owners are required to give notice of a range of information to the body corporate to be kept on the body corporate roll. However, the details of a mortgagee are only required when the mortgagee enters into possession of a lot. For example, Standard Module ss 193(1)(e)-(f), 196(2)(f).

highlighted by the use of Part IX debt agreements<sup>62</sup> which may require a body corporate to accept less than the full amount of outstanding body corporate debt.

Body corporate debts are enforceable jointly and severally against previous and subsequent owners (including a mortgagee in possession) if the lot is sold.<sup>63</sup> However, the body corporate may not be entitled to recover the body corporate debt at settlement of the sale, even if the debt is outstanding at that time. The body corporate may have to take debt recovery action against the new owner. An incoming owner is unlikely be happy about being liable for a debt that was incurred by the previous owner.

#### **Options Paper Question 19**

**Should the body corporate have a non-judicial power of sale over a lot when the lot owner has outstanding body corporate debt?**

One option that was discussed to give the body corporate greater security for unpaid body corporate debt is to allow the body corporate to have a non-judicial power of sale over a lot. Of the 57 submissions that commented on this question, 32 did not support this option.

The submissions that supported this option generally commented that it should be limited to situations where the unpaid amounts have been outstanding for two to three years and that it should be exercised subject to strict requirements.

Those that did not support this option argued that such a power is too great to put into the hands of a body corporate. Most mortgagees are banks that are regulated and must exercise a power of sale subject to strict guidelines.<sup>64</sup> Bodies corporate on the other hand are effectively unregulated and comprised of lot owners. It may be very difficult (if not impossible) to ensure that bodies corporate follow similarly strict guidelines in exercising a power of sale.

The Queensland Registrar of Titles opposed a non-judicial power of sale for bodies corporate, noting that a judicial power of sale already exists through the use of a writ of execution. Further, the Registrar noted that any power to interfere with a person's property should only be exercised by appropriately qualified and regulated officers and must be accompanied by a right of compensation for misuse of the power.

The Queensland Law Society made similar arguments, noting that the risk of a misuse of a power of sale by the body corporate is greater than the benefit that would be produced by granting this power.

This option was not supported by the OCN, SCA or ARAMA. Given the lack of public support, the Centre recommends that this option not be pursued at this time.

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<sup>62</sup> A Part IX debt agreement is an alternative to bankruptcy under the *Bankruptcy Act 1966* (Cth). For further information, see <https://www.afsa.gov.au/debtors/debt-agreement>.

<sup>63</sup> See the relevant Regulation Module, for example, Standard Module s 145(3).

<sup>64</sup> For example, *Property Law Act 1974* (Qld) ss 84-85.



#### **Recommendation 16 – Power of sale**

There should be no change to the ability of the body corporate to force the sale of a lot for unpaid contributions.

### **3.5. Body corporate debt as a charge on the lot**

Interestingly, many of the submissions that were opposed to giving the body corporate a non-judicial power of sale for outstanding body corporate debt supported the option to make body corporate debt a charge on the lot.

The liability to pay a body corporate debt is enforceable jointly and severally against the lot owner at the time the debt became payable and any other person, including a mortgagee in possession, who becomes the lot owner before the debt is paid.<sup>65</sup> If a prospective purchaser enters into a contract to buy the lot and later discovers that there is an unpaid body corporate debt, that prospective purchaser may become liable for the debt. There is no express statutory requirement to pay an outstanding body corporate debt on settlement of a sale of the lot and the purchaser may not, depending on the terms of the contract of sale, have a right to terminate the sales contract.

#### **Options Paper Question 20**

**Should the body corporate debt of a lot owner be a charge on the lot?**

Of 58 submissions that addressed this question, only three answered in the negative. Most submissions felt that the charge is a good alternative to a power of sale as it provides security for the body corporate that the debt will be paid at some point but without the risk of abuse that a power of sale may create.

Notably, the Queensland Registrar of Titles considered that this option was not supported by the current legislative framework. The Registrar argued that it is inappropriate to allow a charge on an owner's lot for unpaid debts in relation to common property. This is because the lot owner's interest in the common property is held as tenants in common with the other lot owners and is inseparable from the interest held by the other lot owners.<sup>66</sup> Essentially, the argument is that a lot's interest in the common property is not a separate interest that can be subject to a charge.

The BCCM Act provides that any dealing with the lot affects, without express mention, the interest in the common property.<sup>67</sup> This means that a charge on the lot would be deemed to be a charge on the lot and the lot's share of the common property, even though the lot's share of the common property

<sup>65</sup> Standard Module s 145(3); Accommodation Module s 143(3); Commercial Module s 104(3); Small Schemes Module s 79(3); Two-lot Module s 27(5) (The Two-lot Module does not use the term 'body corporate debt' but the relevant provision has the same function).

<sup>66</sup> BCCM Act s 35.

<sup>67</sup> BCCM Act s 35 (3) at example 1.



cannot be dealt with separately. As such, it may be justifiable to place a charge on the lot to secure an unpaid debt in relation to the common property.

The main reason to make body corporate debt a charge on the lot is to protect subsequent lot owners who become liable to pay a body corporate debt even if they were not the owner of the lot at the time the debt was incurred. If the body corporate debt is deemed to be a charge on the lot, it will have to be satisfied or discharged when the lot is sold. This means that subsequent owners will not end up paying for body corporate debt incurred prior to their ownership of the lot.

Additionally, such a charge would give the body corporate a greater security for recovery of body corporate debt. Any sale of the lot, whether by a mortgagee,<sup>68</sup> receiver or the lot owner will require that the statutory charge on the lot be discharged at or before settlement.

This option is supported by the PCA, the OCN and the SCA. The Queensland Law Society supported this option provided the charge is created and exists by statutory means.

It has been suggested that the charge should be lower in priority than the statutory charges that exist for unpaid rates<sup>69</sup> and unpaid land tax<sup>70</sup> and as such, it will not be a charge that can be registered with the Registrar of Titles.

It has been suggested that if body corporate debts are deemed to be a charge, this may give rise to an interest in a lot<sup>71</sup> which could result in a caveat being lodged that prevents a lot owner from selling the lot to get out of financial difficulty. This risk can be mitigated if the BCCM Act provides that a charge on a lot for body corporate debt does not give rise to an interest in the lot for the purpose of a caveat under the *Land Title Act 1994* (Qld).

The BCCM Act provides that the body corporate cannot hold an interest in a lot unless that interest is a registered easement or where the lot is acquired to become common property.<sup>72</sup> If implemented, this option will require that a statutory charge on the lot for the purposes of securing body corporate debt is not an interest in a lot for the purposes of the BCCM Act or the *Land Title Act 1994* (Qld).

#### **Recommendation 17 – Body corporate debt to form a charge on the lot**

The BCCM Act should provide that unpaid body corporate debt for the lot is a statutory charge on the lot but such charge does not represent an interest in the lot for the purposes of the *Land Title Act 1994* (Qld) or the BCCM Act.

The statutory charge for body corporate debt will be lower in priority than charges for unpaid rates and unpaid land tax.

### **3.6. Maximum time before debt recovery**

<sup>68</sup> Whether or not the mortgagee is a mortgagee in possession for the purposes of the BCCM Act. See BCCM Act schedule 6 (definition of a 'mortgagee in possession').

<sup>69</sup> *Local Government Act 2009* (Qld) s 95(2).

<sup>70</sup> *Land Tax Act 2010* (Qld) s 60.

<sup>71</sup> *Land Title Act 1994* (Qld) s 122.

<sup>72</sup> BCCM Act s 44.

Under the BCCM Act, if the amount of unpaid contributions has been outstanding for two years, the body corporate must take action to recover the amount within 2 months of the end of the two year period.<sup>73</sup> Obviously, there is nothing to stop a body corporate from beginning recovery as soon as the amounts are overdue. However, the rate of penalty interest may be very high (up to 2.5% per month or 30% per annum).<sup>74</sup> It has been suggested that some bodies corporate will allow the debt to accrue penalty interest for extended periods rather than make efforts to collect the debt early.

#### **Options Paper Question 21**

**How long should bodies corporate allow unpaid contributions to accrue before taking steps to recover the amounts?**

More than 50 submissions addressed this question. Responses ranged from one month to three years. Some submissions suggested that the BCCM Act should specify how long after the contribution is due before the body corporate can attempt recovery (and incur recovery costs).

The Centre recommends that the BCCM Act should continue to specify a maximum period of time after which the body corporate must take action, rather than prescribing a minimum period of time before the body corporate may take action. There should be no change to the current provisions that allow the body corporate to take action to recover unpaid contributions as soon as the amounts are overdue.

However, there are good reasons to prescribe a maximum duration after which the body corporate must begin debt recovery. This protects the non-defaulting lot owners by providing that unpaid contributions do not continue to accrue for unreasonably long periods of time thus keeping the unpaid amounts lower than may be the case if they remain outstanding for longer periods. A short time frame can also protect defaulting lot owners by minimising the amount of penalty interest and recovery costs that will be added to the unpaid contributions to form a body corporate debt.

It is suggested that the debt recovery period be shortened to one year. Generally speaking, unpaid contributions are likely to be lower after one year than would be the case if they had been outstanding for two years (particularly given the 30% annual penalty rate).

#### **Recommendation 18 – Debt recovery time**

The body corporate should be required to take action to recover unpaid contributions within two months after any contributions have been outstanding for one year.

### **3.7. Address for service**

<sup>73</sup> Standard Module s 145(2); Accommodation Module s 143(2); Commercial Module s 104(2); Small Schemes Module s 79(2) The timeframe does not apply under the Two-lot Module: s 27.

<sup>74</sup> 2.5% per month as prescribed in the Regulation Modules. Standard Module s 144(1); Accommodation Module s 142(2); Commercial Module s 103(2); Small Schemes Module s 78(2);

### Options Paper Question 22

**Are there any reasons why the Regulation Modules should not require lot owners to provide an Australian address for service and maintain the accuracy of the address?**

Of 51 submissions that addressed this question, only four identified reasons against requiring all lot owners to have and maintain an address for service in Australia. Notably, this option was opposed by the PCA and the OCN. It was suggested that this will place an additional burden on overseas investors and lot owners who live or work overseas for an extended period of time. It may be particularly burdensome on overseas lot owners who do not have their lot rented or occupied while they are overseas. It was also argued that requiring an Australian address for service will not address the problem of unpaid contributions by overseas lot owners.

Many of the responses that supported imposing an Australian address requirement stated that an email address should be sufficient for notices of contributions and that if allowed, this would not place an undue burden on overseas lot owners. The issue of whether an email address can be considered an 'address for service' is discussed in an issues paper titled *Procedural issues under the Body Corporate and Community Management Act 1997*,<sup>75</sup> (**Procedural Paper**). If the reforms discussed in the Procedural Paper are adopted, an email address may be sufficient as an address for service of notices from the body corporate.

It is recommended that where an Australian address is not provided or has been determined to be inaccurate, the address for service will be the address of the lot. This is the current position if the lot owner has not provided an address for service.<sup>76</sup>

### Recommendation 19 – Address for service

The Regulation Modules should require all lot owners to provide an address for service that is in Australia.

If an Australian address is not provided or has been determined to be inaccurate, the address for service will be deemed to be the address of the lot.

## 3.8. Substituted service for failure to provide an Australian address

If a lot owner refuses, or is unable, to pay their contributions, the body corporate must take steps to recover the debt which may ultimately result in legal action against the lot owner. To commence legal action to recover a debt, the body corporate must serve legal documents, known as **originating process** on the defaulting lot owner. Generally, originating process requires personal service.<sup>77</sup> If the

<sup>75</sup> Commercial and Property Law Research Centre, *Property Law Review Issues Paper: Procedural Issues Under the Body Corporate and Community Management Act 1997*, (**Procedural Paper**) December 2015, available at <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-property-law-in-queensland>.

<sup>76</sup> BCCM Act s 315(4).

<sup>77</sup> *Uniform Civil Procedure Rules 1991* (Qld) (**UCPR**) rule 105.

defaulting lot owner is overseas, this may be very difficult, especially if no address for service has been given, the address is out of date and no Australian agent has been notified to the body corporate. If the lot owner cannot be located, the body corporate will have to seek substituted service, which involves additional legal costs. If these costs cannot be recovered, they must be borne by the other lot owners in the scheme.

Debt recovery from overseas lot owners can be one of the most problematic areas of debt recovery facing a scheme. Most lot owners, including most overseas lot owners, pay their contributions on time or within a reasonable amount of time after they become due. Some lot owners do not pay on time and the body corporate may carry significant sums of body corporate debt. One submission commented that there is more than \$350,000 in unpaid contributions at their scheme, with a majority due to overseas lot owners. The time and effort involved in service of process overseas or substituted service in Australia is likely to be burdensome on a body corporate and the chances of full recovery of the associated costs are limited.

### **Options Paper Question 23**

**Are there any reasons why the BCCM Act and the UCPR should not provide special provisions to assist a body corporate to recover unpaid contributions from lot owners that have not provided an Australian address for service?**

Of 48 submissions that addressed this question, only five argued that there are reasons against providing special service provisions for bodies corporate when seeking to recover unpaid contributions from overseas lot owners. It was noted that there are already existing processes available to apply for substituted service. It was argued that a body corporate should not be treated differently than any other creditor when it comes to taking action for debt recovery.

Conversely, it was argued that the debtor / creditor relationship in a body corporate is unique and unlike other types of debt. When a lot owner in a body corporate does not pay their contributions, they are effectively borrowing from the other lot owners. The non-defaulting lot owners have very little say in whether to 'loan' the money or not. Unlike a traditional lender/borrower relationship, the 'lender' (the non-defaulting lot owners) does not have any say in who the 'borrower' (the defaulting lot owner) will be. The members of the body corporate cannot stop a person from becoming (or remaining) a lot owner. The body corporate does not assess potential lot owners' credit worthiness and has no say in whether a person becomes a lot owner or not. If the lot owner defaults on their obligation to pay contributions, the body corporate will have to make up the shortfall or do without important services and possibly even postpone important maintenance work.

Despite overwhelming support for changing the rules in relation to service of originating process to collect unpaid contributions, personal service of originating process is a cornerstone of the modern judicial system. A party cannot be expected to turn up for a day in court if they are not made aware of the proceedings.

Given this, there is little legal justification to provide special provisions for bodies corporate at this time.

### Recommendation 20 – Overseas service

It is recommended that the existing rules in relation to the service of originating process to collect unpaid contributions, penalty interest and recovery costs should remain unchanged at this time.

## 3.9. Collecting after a judgment: Garnishee of rental income

After the body corporate is successful in getting a judgment against a lot owner for outstanding body corporate debt, the body corporate may be faced with the task of enforcing the judgment. If the lot owner does not pay the outstanding amount, the body corporate must take further legal action to obtain an enforcement warrant from the court allowing the body corporate to seize (and if necessary, sell) the property of the lot owner.

If the lot owner is employed and earning an income, the body corporate may seek a court order to redirect part of the lot owner's earnings to the body corporate to pay the amount of the judgment. If the lot owner is owed a debt, the body corporate may seek an order redirecting the payment of that debt to the body corporate.

If the lot owner is overseas or cannot be located, enforcement of the judgment may become a very difficult proposition. In some cases when the lot owner's whereabouts are overseas or unknown, the lot may be rented with the rental income returning to the lot owner. While the body corporate may be able to obtain a court order directing that some of the funds paid by the tenant of the lot are redirected to the body corporate to pay the debt, this may be a difficult, time consuming and expensive process.

If there is a rental agent for the lot, and the body corporate knows who the rental agent is, it may be possible to seek an order redirecting a portion of the rental income paid on the lot to the body corporate to satisfy the debt. The name and contact details of the rental agent should be notified to the body corporate<sup>78</sup> but it is understood that lot owners often fail to do this.<sup>79</sup> There is no way for the body corporate to force a lot owner to provide this information. It may be difficult for the body corporate to determine whether there is a letting agent for a lot and if so, who it is.

### Options Paper Question 24

**In circumstances where a body corporate has obtained a judgment against a lot owner for unpaid body corporate debt, should the body corporate have a mechanism to garnishee the rental income from the lot to satisfy the judgment by serving the tenant or real estate agent for the lot? Why or why not?**

<sup>78</sup> Standard Module s 193(3)(c); Accommodation Module s 191(3)(c); Commercial Module s 127(3)(c); Small Schemes Module s 127(3)(c); Two-lot Module s 64(3)(c).

<sup>79</sup> The Regulation Modules specify a maximum penalty of 20 penalty units for failure to comply with the obligation to provide the required information. However, the body corporate would have to pursue a civil penalty through the Magistrates Court.

A total of 53 submissions addressed this question. Of those, 44 were in support of allowing a body corporate to garnishee rental income when the lot owner has a body corporate debt and there has been a judgment ordering the payment of that body corporate debt, the associated penalty interest and recovery costs. Only seven submissions did not support this option.

Notably, in opposing this option, the SCA argued that this power already exists and rests with the court, which is where it should remain. Some body corporate lawyers suggested the power to garnishee rental income should remain with the court but that it could be made clear that an enforcement warrant can apply to rental income. Other reasons given against supporting this option include that it may place an undue burden on a tenant.

ARAMA stated that it supports this option but only if the garnishee order is placed on the real estate agent, allowing the real estate agent to direct rental payments after authorised expenses have been deducted. The PCA provided a similar comment, stating that it supports this option provided it does not impact on the ability of rental agents to deduct their fee from the funds.

The arguments in support of this option include that the income being derived by the rental of the lot should be available to satisfy body corporate debts as the tenants in the lot have use of the common property. Some submissions suggested that the tenants in this situation should be restricted from using common property such as the pool or other facilities if there is an unpaid judgment for body corporate debt against the lot owner. However, this would be impossible to enforce and may breach the BCCM Act.

It can be argued that giving bodies corporate a power to garnishee rental income is treating bodies corporate differently than other creditors. As with the recommendation for special service requirements, there are good reasons to treat bodies corporate differently. The body corporate stands in a different position in relation to the debtor than other creditors because the 'loan' at the centre of this relationship is not one that the body corporate had any say in making. The 'loan' involves amounts relating to the common property and any amounts recovered will go towards meeting those expenses.

This special power would only be used in situations of last resort after a judgment has been made against the lot owner and where there are no other amounts, such as wages or a debt owing to the lot owner that can be redirected to satisfy the judgment. In short, such a power would be rarely utilised.

#### **Recommendation 21 – Garnishee rental income**

Where there is a judgment against a lot owner for unpaid contributions, penalty interest and recovery costs, and the lot is generating income from being rented or leased, the body corporate should have a simple method to garnishee the rental income until the judgment has been satisfied.

Where the garnishee order is not directed against the lot owner, it may be directed against an agent of the lot owner (if any) who is receiving rental income on behalf of the lot owner.

## 4. Scheme termination

### Options Paper Questions 25-26

**Should a body corporate be able to voluntarily terminate the scheme with less than 100% agreement of lot owners? What percentage should be required?**

**What safeguards should be in place for lot owners that do not support the voluntary termination?**

Scheme termination is when an existing scheme is cancelled and the body corporate is dissolved. This will usually occur where the existing buildings and structures are to be knocked down and the scheme land redeveloped.

Much of the discussion around this issue has focused on reducing the threshold of owners needed to terminate a scheme from an effective unanimous requirement to some lower percentage. If the threshold is reduced, some individual lot owners may be forced to sell their lot against their will to allow the scheme to be terminated and possibly redeveloped. As such, this issue has the potential to be very controversial. Despite this, only 48 submissions addressed the relevant questions.

Of those, the majority (36 out of 48) supported reducing the threshold. There was no clear agreement as to what that threshold should be. The submissions varied from a simple majority up to 95%. Generally, it was argued that the will of the majority should not be thwarted by one lot owner or a small minority of lot owners.

The submissions that opposed reducing the threshold for termination had different reasons. Some noted that the resolution without dissent does not actually require unanimous consent. It merely requires that no lot owner vote against the motion. Other submissions commented that there is no need to reduce the threshold because the body corporate or another person<sup>80</sup> may apply to the District Court for an order terminating the scheme.

Some submissions commented that simply reducing the threshold for scheme termination misses the larger picture. Rather, it was argued, the focus should be on collective sales of lots and common property in the scheme and the circumstances in which a lot owner may be forced to sell their lot against their will to a third party (generally, a developer<sup>81</sup> who will redevelop the scheme land). Once all the lots are owned by a single entity<sup>82</sup> that entity can easily terminate the scheme, knock down the existing structures and redevelop the scheme land.

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<sup>80</sup> The body corporate, a lot owner or an administrator appointed under the dispute resolution provisions: BCCM Act s 78(4).

<sup>81</sup> For ease of reference in this section, the person proposing the scheme termination or seeking to acquire the lots will be generally be referred to as a developer even though the person may not actually be one.

<sup>82</sup> The single entity may be one person, a group of people, a joint venture or a company.

## 4.1. Current provisions in Queensland

Currently, a scheme may be terminated in two ways:<sup>83</sup> by a resolution without dissent provided there is an agreement about termination issues;<sup>84</sup> or by an order of the District Court if the Court is satisfied it is just and equitable in the circumstances to terminate the scheme.<sup>85</sup> Only the body corporate, a lot owner or an administrator appointed under the dispute resolution provisions may apply to the District Court for an order terminating the scheme.<sup>86</sup> The person making the application to the District Court is not required to have attempted to terminate the scheme by a resolution without dissent prior to bringing the application. However it is unlikely that a party would bring an application to the District Court without raising the issue with the body corporate in a general meeting.

Once a scheme is terminated, the title to all individual lots is cancelled and replaced with a single title<sup>87</sup> held by the individual owners of the former lots as tenants in common.<sup>88</sup> The body corporate is dissolved and the assets and liabilities of the scheme are vested in the owners of the former lots as tenants in common in shares proportionate to their respective interest schedule lot entitlements (as immediately before the termination).<sup>89</sup>

Scheme termination generally comes about in one of two ways. The first is that the body corporate is faced with a very large bill for significant repair or upgrade of common property. The costs may be anywhere from \$10,000 to \$100,000 (or more) per lot owner. In these circumstances, the body corporate may decide that rather than incurring such large expenditure, it is time to investigate the possibility of terminating the scheme and selling the land so that it can be redeveloped. The second situation comes about when a developer purchases the lots in an existing scheme. This may happen all at once through a collective sale of all the lots in the scheme, or progressively over a period of time. Once all lots have been acquired, the developer will terminate the scheme and redevelop the site (sometimes by amalgamating it with adjacent sites).

Both situations involve the voluntary sale of lots and leave the body corporate and the developer open to the holdout issue,<sup>90</sup> where a single lot owner or a small group refuse to sell their lot (for whatever reason) effectively vetoing the termination of the scheme. This may mean that the developer is no longer willing to purchase any lots in the scheme and the owners who want to sell may lose the opportunity.

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<sup>83</sup> BCCM Act s 78.

<sup>84</sup> The agreement must be between all registered proprietors of scheme land and each lessee under a registrable or short lease to which scheme land is subject: BCCM Act s 78 (1)(b). It must cover issues such as the disposal, and the disposition of proceeds from the disposal, of scheme land and body corporate assets and the sharing of liabilities of the body corporate: BCCM Act schedule 6 (definition of 'termination issues').

<sup>85</sup> BCCM Act s 78(2).

<sup>86</sup> BCCM Act s 78(4).

<sup>87</sup> *Land Title Act 1994* (Qld) s 115V(3). More than one title may be created, however the registered owners of the title will be all the owners of the lots prior to termination.

<sup>88</sup> *Land Title Act 1994* (Qld) s 115V(4)(b).

<sup>89</sup> BCCM Act s 81(1).

<sup>90</sup> Melissa Pocock, Overcoming the holdout problem when redeveloping strata schemes: research findings. *Strata and Community Title in Australia for the 21<sup>st</sup> Century 2013 Conference*, Gold Coast, Australia, September 2013.



If the scheme cannot be terminated by a resolution without dissent, the body corporate or a lot owner may apply to the District Court for an order terminating the scheme.<sup>91</sup> The District Court must be satisfied that it is just and equitable to terminate the scheme in the circumstances.

To date, no decision of the District Court has considered the meaning of the phrase 'just and equitable' in the context<sup>92</sup> of scheme termination. However that does not mean that the provisions do not work.<sup>93</sup> Rather, it means that bodies corporate and lot owners are reluctant to apply to the District Court for scheme termination. This may be for a number of reasons including the financial costs, the time and effort involved and the perceived uncertainty of outcome.

While many commentators have criticised the need for a resolution without dissent to terminate a scheme, few have actually taken the case to the District Court. This means that where a resolution without dissent cannot be achieved, a termination and redevelopment may stall until the holdouts can reach an agreement with the developer. If no agreement is reached, the developer may walk away, meaning that the other lot owners lose a potentially valuable opportunity. One way to overcome the holdout issue is to reduce the threshold for scheme termination.

Before further discussing the possibility of reducing the threshold for scheme termination it is important to consider why scheme termination has been suggested in the first place.

## 4.2. Reasons for termination

There are a number of situations where scheme termination may become an attractive option. Broadly speaking however, most scheme terminations will fall into one of two situations.

The first situation involves termination for **economic reasons**. This may include situations such as:

- the building is at (or nearing) the end of its economic life;
- deterioration of the scheme buildings (for example, from inadequate maintenance);
- the building suffers from significant defects;
- there has been significant damage from a weather event such as a storm;<sup>94</sup> or
- from some combination of these issues.

In all of these situations, the key factor is that the scheme buildings are uneconomic to repair because the cost of repairing or rectifying the building (for example to meet modern building codes) is prohibitively expensive. This may be when compared to the total value of the scheme land and buildings, the burden on individual lot owners or the costs to completely rebuild. For example, the repairs may cost \$100,000 per lot owner or more and the lots may only be worth around \$400,000. Additionally, the costs of repairs or remediation of the building may outweigh the benefit to the lot

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<sup>91</sup> The party bringing application for scheme termination is not required to have first attempted to terminate the scheme by resolution without dissent.

<sup>92</sup> However, see *Body Corporate for Nobby's Outlook CTS 14822 v Lawes* [2013] QDC 30 where a dissenting owner ultimately agreed to the termination order and a conditional termination was ordered by consent.

<sup>93</sup> Cathy Sherry, Termination of strata schemes in New South Wales – Proposals for reform, (2006) 13 *Australian Property Law Journal* 227 at 236.

<sup>94</sup> Although this would likely be covered by relevant insurance.

owners in the scheme. The repair and/or remediation work may not add value to the scheme and in some cases, may leave the lot owners liable for large ongoing maintenance costs into the future.

The second situation involves termination for the **redevelopment potential** of the scheme land. This may occur in an area where there have been changes in the planning requirements or the character of the neighbourhood. It may also occur where a relatively sound scheme is adjacent to an older scheme and the land can be better utilised by amalgamating adjacent sites into a new development with a larger footprint. In this situation, the redevelopment potential of the scheme land makes it desirable (and profitable) to replace a relatively sound structure with a new, higher density or larger scheme. This may involve, for example, replacing a relatively sound three story structure with a 10 story structure.

Obviously, the two situations can and do overlap. Scheme termination may also be considered where there is a public policy goal such as in-fill development to increase population density, urban renewal or to meet other planning goals. Generally private developers will target schemes in a poor state of repair, that are at or nearing the end of their economic life (or adjacent schemes that can be amalgamated into larger sites) to facilitate these objectives.

Where the buildings in a scheme do not conform to modern health and safety requirements, are deteriorating to the point that it may create a hazard for lot owners and/or the public or the cost of rectifying defects or damage outweighs the benefit to the scheme it is arguable that the termination is proposed for economic reasons. In such circumstances there is at least some justification for the BCCM Act to allow the scheme to be terminated with less than unanimous consent even if this requires that some lot owners are forced to sell their lot against their will to a private third party.

Where the building is otherwise sound and the scheme termination is proposed based on the redevelopment potential of the scheme land, the justification for requiring a private individual to sell their lot to another private individual is less compelling.<sup>95</sup>

It is unlikely that public policy objectives, such as urban renewal or increasing population density, are sufficient to justify legislative provisions requiring a private individual to sell their lot. However, lot ownership in a community titles scheme is a form of co-ownership.

It is not unknown at law for one co-owner of property to apply to the court for an order that the co-owned property be sold and the proceeds divided among the co-owners in accordance with their ownership interest in the property.<sup>96</sup> This generally only occurs where there has been a breakdown in the relationship between the co-owners. The lot owners in a community titles scheme are co-owners of the common property as tenants in common in proportion to the interest schedule lot entitlement of the lot.<sup>97</sup> A lot owner's interest in the common property cannot be separated from the lot owner's interest in a lot.<sup>98</sup>

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<sup>95</sup> For a discussion of arguments justifying 'private to private transfers', see Melissa Pocock, Holdouts, site amalgamations and renewal of urban areas: a call for legislative reform, Paper presented at 18<sup>th</sup> Annual PRRES Conference, Adelaide, Australia 15-18 January 2012.

<sup>96</sup> *Property Law Act 1974* (Qld) s 38.

<sup>97</sup> BCCM Act s 35(1).

<sup>98</sup> BCCM Act s 35(3).

Given this, there is some justification to allow a court to order the sale of a lot to facilitate a sale of the co-owned common property in a scheme even over the objection of one or more co-owners of that property particularly where there are compelling economic reasons. As discussed at paragraph 4.1 above, the BCCM Act makes provision for this to occur with an application to the District Court.

Despite the ability to apply to the District Court there is a perception that the legislation should provide a statutory mechanism to facilitate termination of a scheme over the objection of one or a small minority of individual owners. Before considering how (and when) this might be allowed to occur in Queensland it is useful to consider two recent Australian examples.

### 4.3. The Northern Territory approach to scheme termination

Recently, the Northern Territory (NT) enacted legislation that effectively reduces the threshold for scheme termination for some schemes, becoming the first jurisdiction in Australia to implement such legislation.<sup>99</sup> The legislation provides a scale based on the age of the development:<sup>100</sup> if the development is at least 30 years old, 80% support is needed; if the development is at least 20 but less than 30 years old, 90% is needed; and if the development is at least 15 but less than 20 years old, 95% is needed (each, the **required percentage**). Developments that are less than 15 years old or that have fewer than 10 lots will continue to require unanimous consent of lot owners or an order of the tribunal to be terminated.<sup>101</sup>

Owners vote on a termination plan or a redevelopment proposal put forward by a **proponent** (the developer or person proposing the termination who is willing to purchase the lots in the scheme). The proponent serves the body corporate with a **notice of proposed termination**.<sup>102</sup> The body corporate has from 3 to 12 months to consider the notice and hold a meeting to vote on the resolution to terminate the scheme in accordance with the notice of proposed termination.<sup>103</sup> If the resolution passes by the required percentage, the termination is approved in accordance with the notice of proposed termination.<sup>104</sup>

If the required percentage of lot owners for a termination cannot be achieved or if the required percentage is achieved and some lot owners do not want to sell, then an application may be brought in the tribunal seeking a termination or that the termination not go ahead. The tribunal may order the termination of a scheme if it considers that it is just and equitable to do so and any objection is unreasonable.<sup>105</sup> There are factors set out in the legislation that the tribunal must consider when deciding whether to make an order approving the proposed termination. These factors include:

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<sup>99</sup> This was followed by NSW (as discussed at section 4.4 below).

<sup>100</sup> *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) s 2 describes how to determine the age of a development for the purposes of the required percentage.

<sup>101</sup> *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) s 4 (definition of 'required percentage') and s 8.

<sup>102</sup> The notice must be approved by the schemes supervisor prior to being served on the body corporate: *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) ss 9(1) and 10(6) (definition of 'notice of proposed termination').

<sup>103</sup> *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) s 11.

<sup>104</sup> *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) s 12.

<sup>105</sup> *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) s 17(1).

- the extent that a lot owner is likely to suffer an adverse consequence as a result of an order to terminate the scheme;
- the extent that a lot owner is likely to suffer an adverse consequence as a result of an order not to terminate the scheme;
- the financial benefits and the risks of the proposed termination;
- whether a different order of the tribunal or a court would be more appropriate than termination;<sup>106</sup> and
- whether the body corporate has been functional in the period before the application.<sup>107</sup>

The NT legislation also sets up a process for the sale of the dissenting lot owners' lots to the proponent.<sup>108</sup> Under the legislation, after the resolution passes by the required percentage, the dissenting owner has several options including challenging the proposed termination in the tribunal or agreeing to the proposal and selling their lot to the proponent.<sup>109</sup>

If the dissenting owner agrees to sell their lot, the sale is as agreed between the parties or if they cannot agree on a price,<sup>110</sup> as determined by a valuer in accordance with the rules that apply to compulsory acquisitions of land by the NT government.<sup>111</sup> The dissenting owner may sell for the amount of the valuation, or if they disagree with the valuation, apply to the tribunal.<sup>112</sup> The tribunal may make an order it considers necessary including one that sets the terms and conditions of the sale.<sup>113</sup>

#### 4.4. The NSW approach to scheme termination

In November 2015, NSW passed two Acts to bring about significant reform of their strata schemes legislation. One of the most discussed issues in the new legislation is scheme termination or strata renewal. The lot owners of any scheme, regardless of the age of the scheme or its state of repair, may, with the support of the owners of 75% of the lots, approve a plan for the collective sale or redevelopment of the scheme. Provided the proper procedure has been followed, the plan will be enforceable even over the objections of a dissenting lot owner.

The legislation implementing these changes<sup>114</sup> was passed in November 2015 and commenced on 30 November 2016. The reduced threshold applies to new schemes and to existing schemes that opt in to the new provisions.<sup>115</sup>

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<sup>106</sup> *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) s 17(2).

<sup>107</sup> This factor is prescribed by the regulation: *Termination of Units Plans and Unit Titles Schemes Regulation* (NT) s 6.

<sup>108</sup> *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) s 13.

<sup>109</sup> *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) s 12(1)(c).

<sup>110</sup> *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) s 13(4).

<sup>111</sup> The valuer must value the lot using the rules in schedule 2 of the *Lands Acquisition Act* (NT): *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) s 13(4)(d)(i).

<sup>112</sup> *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) s 13(5).

<sup>113</sup> *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) s 13(6)(f).

<sup>114</sup> *Strata Schemes Development Act 2015* (NSW) part 10.

<sup>115</sup> Opt-in is by majority vote. However, if there is enough support to terminate the scheme, opt-in is unlikely to be difficult. See [www.fairtrading.nsw.gov.au/ftw/About\\_us/Have\\_your\\_say/Review\\_strata\\_community\\_scheme\\_laws/Collective\\_sale\\_and\\_renewal\\_reforms.page](http://www.fairtrading.nsw.gov.au/ftw/About_us/Have_your_say/Review_strata_community_scheme_laws/Collective_sale_and_renewal_reforms.page).

In NSW, the strata renewal process<sup>116</sup> commences with a termination proposal,<sup>117</sup> usually from a developer.<sup>118</sup> The termination proposal is then considered by the strata committee.<sup>119</sup> If the strata committee decides the proposal warrants further consideration, it is sent to the owners corporation<sup>120</sup> to be considered at a general meeting.<sup>121</sup> The owners in a general meeting can then decide whether to further investigate the proposal. If the owners corporation decides that further investigation of the plan is warranted, the owners corporation forms a strata renewal committee.<sup>122</sup> The strata renewal committee progresses the proposal into a strata renewal plan. The plan will be either a collective sale (of all the lots and common property) or a redevelopment of the scheme. At a second general meeting, the owners consider the plan and may vote to send the strata renewal plan to all lot owners for consideration.<sup>123</sup> The lot owners have at least 60 days to consider the proposal. After that time, lot owners may give a notice of support in favour of the strata renewal plan.<sup>124</sup>

If the owners of at least 75% of the lots in the scheme give a notice of support<sup>125</sup> the owners corporation must take several steps. Firstly, the owners corporation must notify the registrar of titles.<sup>126</sup> Once the registrar has been notified that the required level of support has been obtained, a lot owner may not withdraw its support for the plan.<sup>127</sup> Secondly, the owners corporation must convene a general meeting to decide whether to apply to the Land and Environment Court<sup>128</sup> for an order to give effect to the strata renewal plan.

If the owners corporation does not resolve to apply to the court, the plan will lapse.<sup>129</sup> This means that even if 100% of the owners are in agreement with the termination plan, the owners corporation cannot give effect to the plan without an order of the court. The court will have the power to make necessary ancillary orders to give effect to the plan (such as vesting an owner's lot in a trustee for the purpose of selling the lot).<sup>130</sup>

If the plan is for a collective sale, the amount paid for the sale of the lots and common property will be divided among each lot owner in proportion to the unit entitlements for each lot.<sup>131</sup> Each lot owner

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<sup>116</sup> See *Strata Schemes Development Act 2015* (NSW) part 10 generally.

<sup>117</sup> Under the legislation this is called a 'strata renewal proposal': *Strata Schemes Management Act 2015* (NSW) s 156(1).

<sup>118</sup> Any person (whether an owner of a lot in the scheme or not) may give a written proposal to the owners corporation of the scheme: *Strata Schemes Development Act 2015* (NSW) s 156(1).

<sup>119</sup> *Strata Schemes Development Act 2015* (NSW) s 157. In NSW, the committee is referred to as the strata committee.

<sup>120</sup> In NSW, the body corporate is referred to as an owners corporation.

<sup>121</sup> *Strata Schemes Development Act 2015* (NSW) s 158.

<sup>122</sup> *Strata Schemes Development Act 2015* (NSW) ss 160-169.

<sup>123</sup> The owners corporation may also vote to send the plan back to the strata renewal committee for amendment or not to continue with the plan: *Strata Schemes Development Act 2015* (NSW) ss 172-173.

<sup>124</sup> *Strata Schemes Development Act 2015* (NSW) s 174.

<sup>125</sup> *Strata Schemes Development Act 2015* (NSW) s 154 (definition of 'required level of consent').

<sup>126</sup> The registrar must make appropriate recordings in the folio for the common property: *Strata Schemes Development Act 2015* (NSW) s 176(3).

<sup>127</sup> *Strata Schemes Development Act 2015* (NSW) s 176(2).

<sup>128</sup> *Strata Schemes Development Act 2015* (NSW) s 178.

<sup>129</sup> *Strata Schemes Development Act 2015* (NSW) s 177(1)(c).

<sup>130</sup> *Strata Schemes Development Act 2015* (NSW) ss 181-187.

<sup>131</sup> Unit entitlements in NSW are generally set based on a valuation of the lot as a percentage of the total value of all the lots in the scheme. Common expenses are divided between lot owners on the basis of unit

will receive at least the compensation value of their lot, which is to be determined in the same way that compensation for compulsory acquisition of land by the government would be determined.<sup>132</sup> The compensation value of a lot will include not just market value of the land but also other considerations including any special value of the land to the owners, any loss attributable to the severance or disturbance and compensation.<sup>133</sup>

## 4.5. Lessons from Australian approaches to scheme termination

Across Australia, there has been a wave of interest in the issue of scheme termination.<sup>134</sup> The Northern Territory and NSW have both passed legislation to allow scheme termination with less than unanimous consent of lot owners. Western Australia is currently considering draft legislation that will implement a similar reform.<sup>135</sup> The legislation adopted in the Northern Territory and NSW provide useful examples for Queensland. The approach adopted in other jurisdictions can inform the debate in Queensland. However, each state and territory has unique strata legislation and different demographic, environmental and planning considerations.

### 4.5.1. Lessons from the NT approach to scheme termination

In the NT, the reduced threshold does not apply to schemes with fewer than 10 lots. If Queensland were to adopt this approach, the vast majority of schemes would be excluded. In Queensland, as at 31 December 2016, over 82% of all schemes have 10 lots or fewer.<sup>136</sup>

In the NT, the vote is to accept a conditional termination in accordance with the notice of proposed termination. It is not a vote on termination itself. The NT legislation sets a process for the purchase of the dissenting lot owner's lot by the proponent of the termination while giving the dissenting lot owner a right to appeal against termination and to challenge the figure paid for their lot.

The NT approach uses the age of the development as a rough guide to its condition. Age is one factor that may indicate the condition of the building (but in the NT is also relevant for cyclone and building

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entitlements: *Strata Schemes Management Act 1996* (NSW) s 78. Under the new legislation, unit entitlements will be set based on the market value of lots: *Strata Schemes Management Act 2015* (NSW) schedule 2, s 2.

<sup>132</sup> *Strata Schemes Development Act 2015* (NSW) s 154 (definition of 'compensation value'). See also *Lands Acquisition (Just Terms Compensation) Act 1991* (NSW) s 55.

<sup>133</sup> *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 55. Note that when the regulations for the *Strata Scheme Development Act 2015* (NSW) are promulgated, a different method of determining value may be prescribed: *Strata Schemes Development Act 2015* (NSW) s 154 (definition of 'compensation value').

<sup>134</sup> See for example Northern Territory, Department of the Attorney-General and Justice, *Report: Cancellation Provisions Under the Unit Titles Act and Unit Title Schemes Act*, September 2013, available at [http://www.nt.gov.au/justice/policycoord/documents/lawmake/2013/final\\_report\\_unit\\_titles\\_cancellation.pdf](http://www.nt.gov.au/justice/policycoord/documents/lawmake/2013/final_report_unit_titles_cancellation.pdf); New South Wales Government, Office of Fair Trading, *Strata Title Law Reform: Strata & Community Title Law Reform Position Paper*, (2013), available at [www.fairtrading.nsw.gov.au/biz\\_res/ftweb/pdfs/About\\_us/Have\\_your\\_say/Strata\\_title\\_law\\_reform\\_position\\_paper.pdf](http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Have_your_say/Strata_title_law_reform_position_paper.pdf).

<sup>135</sup> WA has proposed a 75% support threshold for schemes with 4 or more lots, or the majority if a scheme has 2 or 3 lots. See: [www.landgate.wa.gov.au/titles-and-surveys/strata-reform](http://www.landgate.wa.gov.au/titles-and-surveys/strata-reform).

<sup>136</sup> As at 31 December 2016, there are 38,196 schemes with 10 or fewer lots out of a total of 46,335 schemes in Queensland. This is 82.4% of all schemes: Queensland Registrar of Titles: Information provided by the Office of the Registrar of Titles, Department of Natural Resources and Mines, Queensland as at 31 December 2016.

codes).<sup>137</sup> The condition of a building depends on a number of factors such as: the age of the building or scheme; environmental exposure; the materials used in the construction; and regular and adequate maintenance, among others.

#### 4.5.2. Lessons from the NSW approach to scheme termination

In NSW, the 75% threshold applies to all new schemes and to existing schemes that opt-in by majority vote. The NSW provisions do not distinguish between schemes where termination is proposed due to the condition of the building and schemes where termination is proposed based on the redevelopment value of the scheme land. There is no requirement that the scheme must be of a certain age or uneconomic to repair before the reduced threshold applies. This means the termination process could be used to terminate an otherwise sound scheme based only on the redevelopment potential of the scheme land. The termination procedure addresses this by providing several layers of protection for lot owners, including ensuring that lot owners receive at least the compensation value of their lot and that the strata renewal plan can only be enforced by an order of the court.

Under the NSW legislation, even if there is unanimous support of all the lot owners in the scheme, the strata renewal plan cannot be enforced without an application to the court.<sup>138</sup> If the strata renewal plan has obtained the required level of support but the owners corporation decides not to apply to the court for an order giving effect to the plan, the plan will lapse and be of no effect for the purposes of part 10 of the NSW legislation.<sup>139</sup>

Queensland already has a procedure allowing a court to order the termination of a scheme even over the objections of some lot owners in the scheme. These provisions have yet to be effectively utilised. In the next 10 to 20 years, there will be a very large number of schemes in Queensland that will reach the end of their economic life and require scheme termination to allow the land to be redeveloped. Some schemes will have difficulty being terminated without resorting to the District Court. The first few court-ordered terminations will create precedent that will inform scheme termination at other schemes. Despite this, there are good reasons to provide legislative clarity around the issue of scheme termination.

#### 4.6. Prescribed procedure for scheme termination

The Centre recommends that the BCCM Act should be amended to include a **prescribed procedure** for scheme termination that will apply to all schemes. This will bring more certainty to an issue that is becoming increasingly prevalent. Figure 1 below provides a flowchart demonstrating how this may look in practice.

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<sup>137</sup> See John Elferink, Attorney-General and Minister for Justice, Northern Territory Government, Media Release – Fairer unit title legislation, 30 September 2014.

<sup>138</sup> After a strata renewal plan has received 75% support, the owners corporation must convene a general meeting to decide (by ordinary resolution) whether to apply to the court for an order to give effect to the plan: *Strata Schemes Development Act 2015* (NSW) s 178(1)(a).

<sup>139</sup> If the owners corporation decides not to apply to the court for such an order, the plan will lapse: *Strata Scheme Development Act 2015* (NSW) s 177(1)(c).

Recommendations 23 to 27 provide further details to explain the prescribed procedure but a brief outline is contained below. It is recommended that the prescribed procedure apply to all schemes considering termination regardless of the reason for termination.

The prescribed procedure will begin with the body corporate considering scheme termination. This may be initiated by a lot owner in the scheme, by a developer approaching the lot owners with a collective sales offer or by the body corporate (for example where the body corporate is facing substantial repair or remediation expenditure). At **step 1**, the body corporate should acquire (or assemble) **relevant information** (as discussed at paragraph 4.6.3 below) to assist with the decision. This may require a resolution of the body corporate in a general meeting and a spending limit may apply.<sup>140</sup>

Alternatively, the body corporate may agree by a resolution without dissent<sup>141</sup> that it is not necessary to collect the relevant information. This path is most likely to be used where scheme termination is being considered due to the redevelopment potential of the scheme land or where all lot owners are in agreement that scheme termination is necessary. In these situations, there may be no need to obtain the relevant information as there are no structural problems with the scheme, or the problems are already well known and all owners agree.

**Step 2** will commence after the lot owners have had an appropriate time to review the relevant information, or if it is agreed that the relevant information is not needed, may commence immediately. This step will require the preparation of a **termination plan** (as discussed at paragraph 4.6.4 below) for lot owners to consider. The termination plan should provide for a number of issues, including the acquisition of all lots in the scheme by a single entity (generally the developer) and any outstanding liabilities of the body corporate.

**Step 3** will commence after lot owners have had an appropriate amount of time to consider the termination plan. At step 3, the body corporate will hold an extraordinary general meeting (**EGM**) called specifically for the purpose of voting on the termination plan. The lot owners may approve the termination plan by a resolution without dissent. Alternatively, the body corporate may decide to return to step 2 to re-develop or amend the termination plan.

If the body corporate fails to approve the termination plan, **step 4** of the prescribed procedure will allow the body corporate or a lot owner to make an application to the District Court to order the termination plan to be implemented. This right will be available only after the body corporate has considered and failed to approve a termination plan. The District Court will have the authority to order the implementation of the termination plan if satisfied that it is just and equitable<sup>142</sup> to do so. This may involve ordering the sale of a lot even over the objections of a lot owner.

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<sup>140</sup> See, for example, Standard Module s 152.

<sup>141</sup> Whether this will remain as a resolution without dissent will depend on the outcome of the current review of procedural issues under the BCCM Act as discussed in *Property Law Review Issues Paper: Procedural Issues Under the Body Corporate and Community Management Act 1997*, prepared by the Commercial and Property Law Research Centre and released by the Department of Justice and Attorney-General, available at <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-property-law-in-queensland>.

<sup>142</sup> Subject to Recommendation 26 below.



Up to this point, the prescribed procedure largely reflects the existing process for scheme termination under the BCCM Act.<sup>143</sup> This means that a scheme may be terminated if:

- lot owners agree by resolution without dissent; and
- to the extent necessary for the effective termination of the scheme, there is an agreement between all registered proprietors of scheme land and each lessee under a registrable or short lease to which scheme land is subject in relation to termination issues.

Under the current definition in the BCCM Act, termination issues<sup>144</sup> means: the disposal (and disposition of proceeds from the disposal) of scheme land; custody, management and distribution of body corporate assets; and the sharing of liabilities of the body corporate. These issues will need to be addressed in the termination plan.

Effectively this maintains the status quo in that a developer may enter into individual agreements with each lot owner to purchase the lots in the scheme. The disadvantage of this approach is that it leaves the developer and other lot owners subject to the hold-out problem.<sup>145</sup> However, the Centre is of the view that there is insufficient justification to legislatively require a lot owner to sell their lot in the absence of a compelling economic reason.

#### 4.6.1. Termination with less than unanimous support

If there are compelling economic reasons, there is arguably greater justification for the BCCM Act to provide a path to scheme termination with less than unanimous support of lot owners. It is recommended that this path only be available for schemes where there are economic reasons for scheme termination.

It is not possible to legislatively prescribe every situation where there will be economic reasons for scheme termination. As discussed further below (at section 4.6.6), it is recommended that the owners in the scheme be given the ability to decide, based on the relevant information, whether there are economic reasons for scheme termination.

As such, the prescribed procedure includes an extra step, **step 1A**. Under this step, the lot owners may agree that the relevant information discloses economic reasons for scheme termination. If a majority of lot owners agree, then a **reduced threshold** should apply for approving a termination plan under step 3. It is recommended that the reduced threshold should require the support of the owners of at least 75% of the lots in the scheme. Further details are provided in Recommendations 23 to 27 below.

If the body corporate fails to approve the termination plan by the reduced threshold, step 4 will allow a lot owner or the body corporate to make an application in the District Court for an order to implement the termination plan. This is the same step as will apply if the body corporate fails to

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<sup>143</sup> BCCM Act s 78(1).

<sup>144</sup> BCCM Act schedule 6 (definition of 'termination issues').

<sup>145</sup> Discussed at section 4.1 above.

approve a termination plan by a resolution without dissent. The same process will apply whether the termination plan requires approval by a resolution without dissent or a reduced threshold.<sup>146</sup>

#### 4.6.2. Protection for dissenting owners

If a termination plan has been approved, either by the reduced threshold or a resolution without dissent, the prescribed procedure will protect the rights of all lot owners, including **dissenting owners** (as discussed at 4.6.7.2). Step 4 of the prescribed procedure will allow a dissenting lot owner to make an application to the District Court for an order that the approved termination plan should not go ahead. Alternatively, the body corporate will be allowed to make an application to the District Court for an order giving effect to the approved termination plan, even to the extent of orders that provide for the sale of a dissenting owner's lot. As above, the District Court will have the authority to order the implementation of the termination plan if satisfied that it is just and equitable to do so.

##### Recommendation 22 – Prescribed procedure for scheme termination

It is recommended that the BCCM Act provide a prescribed procedure for schemes considering scheme termination. The prescribed procedure may include the collection of relevant information and will include the preparation of a termination plan. This will be followed by a vote of the body corporate to approve the termination plan.

Where the body corporate is unable to resolve to approve the termination plan, a lot owner or the body corporate may apply to the District Court for an order approving the termination plan.

#### 4.6.3. Prescribed procedure – Step 1: Relevant information

The body corporate may, of its own volition, decide to consider scheme termination. Alternatively, the body corporate may be approached by a developer (who may already own one or more lots in the scheme) wanting to purchase the remaining lots and redevelop the scheme land. In either case, the body corporate should follow the prescribed procedure.

It is recommended that the first step in the prescribed procedure should be for the body corporate to obtain **relevant information** about the status of scheme land, its value, the costs of repairing and replacing it and what a final distribution of assets may look like upon scheme termination after discharge of all liabilities.

It is recommended that the relevant information include reports from a structural engineer and from a quantity surveyor. The structural engineer's report is likely to identify major defects or other areas of concern that may need to be repaired or remediated to ensure the building is safe and in compliance with the applicable building codes. The quantity surveyor's report is likely to address the

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<sup>146</sup> In the same way that a lot owner who owes a body corporate debt may cast a vote at a general meeting for a resolution without dissent (see Standard Module s 84(2); Accommodation Module s 82(2); Commercial Module s 51(2); Small Schemes Module s 45(2)) a lot owner who owes a body corporate debt will be eligible to cast a vote at a general meeting for a resolution to approve a termination plan even if a reduced threshold is required. This may require amendment to the relevant regulation modules.

costs to rectify defects identified in the structural engineer's reports and ongoing repair and maintenance costs over the next five years or more.

In addition, the relevant information should include an independent valuation of the total value of the common property and all lots (including a valuation of each individual lot in the scheme). The body corporate should also prepare a draft balance sheet incorporating the assets and liabilities of the body corporate. Taken together, these documents and reports will form the relevant information for lot owners to review when considering scheme termination.

The decision to obtain the relevant information will be a decision of the body corporate in a general meeting. If the cost of obtaining the relevant information (taken together) is more than the relevant limit for major spending<sup>147</sup> for the scheme, it may be necessary to obtain at least two quotes for the reports and the valuation prior to placing the resolution on the agenda for a general meeting. The body corporate may consider sharing or recouping the costs of obtaining the relevant information from the developer, if any, who is proposing termination.

It is recommended that a resolution of the body corporate be required to obtain the relevant information as the costs may be significant. Additionally, the decision must be a restricted issue that can only be decided by the body corporate in a general meeting,<sup>148</sup> ensuring the issue is placed on the agenda and the decision is recorded in the minutes. This means that all lot owners will be aware (or should be) aware of the issue. This will function as a safeguard to ensure that a decision to progress scheme termination is made by the body corporate as a whole and not just by the committee.

The relevant information will allow the body corporate to estimate the costs of repairing and replacing the common property and even gauge the remaining economic life of the building. It will give a picture of the value of the land in its highest and best use. The relevant information will give the lot owners an accurate snapshot of the status of the building.

The purpose of obtaining the relevant information is to determine if there are economic reasons for scheme termination. However, it may not be necessary to obtain the relevant information in all circumstances.

Some schemes may pursue scheme termination due to the high redevelopment potential of the land and a lucrative offer to purchase. Other schemes may have a well-documented history of building defects and all owners are in agreement that scheme termination is the best course of action. In these circumstances, the body corporate may agree, by a resolution without dissent, that the relevant information is not needed.

Some schemes may already have on hand the required reports and other information that will demonstrate the status of the scheme land and buildings. Pre-existing reports, valuations and asset and liability statements (provided they are still current) may be assembled into the relevant

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<sup>147</sup> Unless a different amount has been adopted, the relevant limit is the lesser of \$10,000 or \$1,100 for each lot in the scheme. Standard Module s 152; Accommodation Module s 150; Small Schemes Module s 86. See also the schedule in each module (definition of 'relevant limit for major spending'). There is no limit under the Commercial Module.

<sup>148</sup> BCCM Act s 100(2); Standard Module s 42(1)(d); Accommodation Module s 42(1)(d); Commercial Module s 18(1)(c); Small Schemes Module s 18(1)(d).

information (without the need for the body corporate to specifically authorise new expenditure to duplicate readily available material).

Once the relevant information has been produced or assembled, it should be sent to all lot owners for consideration. It is recommended that lot owners have at least 90 days to consider the information. After at least 90 days, the body corporate may hold an EGM under step 1A to consider the relevant information.

If the body corporate has decided not to obtain the relevant information, it may proceed directly to step 2. This means that the decision as to whether to develop a termination plan may be considered at the same general meeting where it is decided not to obtain the relevant information.

#### **Recommendation 23 – Acquiring relevant information**

It is recommended that unless otherwise agreed by a resolution without dissent, a body corporate considering scheme termination should resolve to obtain or assemble the following reports and documents (together, the **relevant information**):

- a structural engineer's report;
- a quantity surveyor's report;
- a valuation of the total value of the common property and all the lots including the individual value of each lot in the scheme; and
- a draft statement of the assets and liability of the body corporate.

After the relevant information has been obtained or assembled, copies should be given to each lot owner in the scheme. Lot owners should then have at least 90 days to review the relevant information.

#### **4.6.4. Prescribed procedure – Step 1A: Consider relevant information**

Not all schemes will decide to obtain the relevant information. Under the prescribed procedure schemes that decide by resolution without dissent not to acquire or assemble the relevant information may proceed directly to step 2. At these schemes, a resolution without dissent will be required to approve the termination plan developed under step 3.

It is likely that the relevant information will take some time to obtain, assemble and produce. The reports that are produced will likely be very technical and the information they contain may not be readily accessible to the average lot owner. It may be necessary for the body corporate to engage an independent consultant to consider the relevant information and put together a brief summary in plain language that can be sent to lot owners to assist with interpretation of the relevant information.

The relevant information will set out the assets and liabilities of the body corporate and allow each lot owner to have a broad understanding<sup>149</sup> of what they will be entitled to and liable for if a termination plan is approved. The relevant information should reveal whether there are economic reasons for scheme termination. It will assist the lot owners evaluating any proposal or collective sales offer put forward by a developer (or later developed or obtained by the body corporate under step

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<sup>149</sup> Specific figures will be included in the termination plan developed under a later step.

2). For this reason, lot owners will need sufficient time to consider the relevant information and decide whether proceeding with scheme termination is an appropriate course of action.

Given this, it is recommended that once assembled, the relevant information should be given to all lot owners for consideration for at least 90 days. Step 1A of the prescribed procedure will allow lot owners to decide whether the relevant information demonstrates economic reasons for scheme termination.

At least 90 days after lot owners have been given copies of the relevant information, the body corporate may hold an EGM for the purpose of deciding whether the relevant information demonstrates economic reasons for scheme termination and to decide whether to develop a termination plan (for step 2). This may best be done using a prescribed form setting out specified information, attaching copies of the relevant information, any independent review of the relevant information and advising lot owners to seek independent financial and legal advice, and to consult with any mortgagee or lessee of their lot.

As discussed above (at paragraph 4.2) there can be no single definition of economic reasons for scheme termination as this will vary from scheme to scheme. It is recommended that the BCCM Act should contain examples of common economic reasons for scheme termination that may be likely to exist at some schemes. It may also be necessary to prepare guidance material to assist bodies corporate and lot owners to recognise economic reasons that may justify scheme termination.

Given the difficulty of a single definition of economic reasons it is recommended that the lot owners in a scheme should decide, based on the relevant information, whether or not there are sufficient economic reasons to justify the termination of their scheme.

It is recommended that if, after considering the relevant information, the body corporate agrees by majority resolution<sup>150</sup> that there are economic reasons for scheme termination, (in accordance with the relevant examples in the legislation and guidance material that is to be developed) then a reduced threshold should apply when approving a termination plan<sup>151</sup> under step 3.<sup>152</sup>

Where the reduced threshold applies, the BCCM Act will continue to provide safeguard protections for minority interests. A lot owner who does not agree with the majority of lot owners that there are economic reasons for scheme termination will have an ability to challenge the body corporate's decision under the existing dispute resolution provisions in the BCCM Act. It is recommended that such a dispute should be a complex dispute within the meaning of the BCCM Act.<sup>153</sup> As with other matters that are complex disputes<sup>154</sup> this will mean that a dispute as to whether the relevant

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<sup>150</sup> A majority resolution requires the votes for the motion are more than 50% of the lots for which persons are entitled to vote on the motion. Only one vote may be exercised by each lot and the vote must be in written form and cannot be exercised by proxy: BCCM Act s 107. The continued use of the majority resolution was discussed in the *Procedural Issues Paper* (see note 141 above).

<sup>151</sup> See step 3 as discussed at 4.6.6 below.

<sup>152</sup> If there is no agreement by majority resolution about economic reasons, the body corporate may still approve a termination plan (at step 3) but approval will require a resolution without dissent. Alternatively, the body corporate may bring an application to the District Court after the resolution without dissent has failed (see step 4 as discussed at 4.6.7 below).

<sup>153</sup> BCCM Act Schedule 6 (definition of 'complex dispute').

<sup>154</sup> See for example, BCCM Act s 133, s 149A, s 149B and s 178.

information demonstrates economic reasons for scheme termination may be resolved by a specialist adjudicator or by the Queensland Civil and Administrative Tribunal (**QCAT**) in its original jurisdiction.

Once a decision about whether or not there are economic reasons for scheme termination has been made, the body corporate will proceed to step 2 and decide whether to develop a termination plan.

#### **Recommendation 24 – Considering the relevant information**

At least 90 days after all lot owners have been given copies of the relevant information the body corporate may agree by majority resolution that there are economic reasons for scheme termination as disclosed by the relevant information.

A lot owner who disagrees with the decision of the body corporate that economic reasons for scheme termination exist may dispute the decision using the existing dispute resolution mechanisms in the BCCM Act.

It is recommended that such a dispute be treated as a complex dispute for the purposes of the BCCM Act so that the matter may be resolved by a specialist adjudicator or by the Queensland Civil and Administrative Tribunal (**QCAT**) in its original jurisdiction.

### **4.6.5. Prescribed procedure – Step 2: Develop termination plan**

Once the relevant information has been obtained and considered (or if the lot owners have agreed by a resolution without dissent that the relevant information is not needed) step 2 of the prescribed procedure is for the body corporate to agree to develop, negotiate or obtain a collective sales agreement, a redevelopment proposal or some other proposal to terminate the scheme (each a **termination plan**). As with the decision to obtain the relevant information, the body corporate will be required to resolve by ordinary resolution to develop a termination plan, and a spending limit may apply. This decision may be made at the same general meeting as step 1, if the body corporate decides not to obtain the relevant information. Alternatively, this decision may be made at an EGM called to consider the relevant information at step 1A.

A termination plan may have been provided to the body corporate by a developer at the initial point of contact (before scheme termination is considered) or the body corporate may seek such proposals through an open tender process. The termination plan may develop over a period of time through negotiation with a developer. It is likely to take some time to develop a plan fully and completely, even if a developer has already made an offer to purchase the lots in the scheme.

It is recommended that the body corporate be required to approve the appointment of a person or persons to oversee the process of developing the termination plan. This person or people will act as a type of **facilitator** to oversee the development of the termination plan, to engage the appropriate parties and to prepare the information for consideration by lot owners. The facilitator may be a group of lot owners who make decisions by consensus or an independent service contractor who has been engaged by the body corporate as a consultant. The facilitator will be responsible for engaging the appropriate parties, experts and contractors to produce the termination plan. For this reason, the body corporate will be required to authorise the facilitator to spend body corporate funds (up to a set maximum amount) to achieve these objectives.

The termination plan will set out the terms and conditions on which the developer will acquire the lots and scheme land. It may include an offer to purchase the whole of the scheme or detail what the developer envisages constructing on the scheme land. It will detail how any assets and liabilities of the body corporate will be divided among the lot owners. It will be necessary to develop specific statutory requirements detailing the exact content of the termination plan.<sup>155</sup>

The termination plan should also provide for the appointment of an independent person to act as an **administrator** of the termination plan. The administrator will require a range of powers, similar to a receiver, to act on behalf of the body corporate in the implementation of the plan. The administrator may be the same as the person engaged to oversee the development of the termination plan, if there is sufficient independence. The administrator must not have any conflicts of interests that would impact on its duties in implementing the termination plan.

The exact requirements of the termination plan and the duties, powers and obligations of an administrator to implement the termination plan may be included in the BCCM Act itself or the relevant regulations. It is recommended that such requirements should be developed in consultation with industry experts.

As a minimum, it is recommended that the termination plan:

- deal with the appointment of an independent person as an administrator with powers to oversee the implementation of the termination plan;
- provide for all the individual lots in the scheme to be acquired by one person or entity, generally the party that will redevelop the land;
- include all arrangements necessary for the developer (or person acquiring the lots in the scheme) to obtain clear title to each and every lot in the scheme;
- deal with the interests of lessees and other registered interest holders in the scheme land;
- provide for the assets and liabilities of the body corporate to be divided among the lot owners; and
- detail how the money offered by the developer will be divided among lot owners and what compensation each lot owner will receive.

The development of the termination plan will likely require consultation with lot owners as it is developed. For example, it may be necessary for lot owners to have input into the types of offers being made and the conditions of those offers at an early stage. This way, lot owners will be involved in the process and they will be able to raise concerns and issues before the plan is officially given to lot owners for consideration. Once the termination plan is fully developed, the plan should be given to each lot owner with a minimum of 120 days to consider the information.

Each lot owner will be able to consider the termination plan and where applicable, consider it in conjunction with the relevant information. Each lot owner should be able to understand what liabilities and obligations they may have if the termination plan takes effect. Each lot owner should also be able to understand exactly how the proceeds of the sale will be allocated upon completion and clearly understand what share of the proceeds of the sale they will receive.

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<sup>155</sup> For example, as is provided in NSW. See *Strata Schemes Management Act 2015* (NSW) s 170.

#### 4.6.5.1. Allocation of assets, liabilities and the proceeds of scheme termination

Currently, the BCCM Act provides that the interest schedule lot entitlement represents the lot owner's interest in the scheme on termination.<sup>156</sup> For new schemes, the BCCM Act requires the interest schedule to be set according to the market value principle.<sup>157</sup> However, from 1997 to 2011, there was no requirement in relation to setting interest schedule lot entitlements.<sup>158</sup>

It is recognised that the interest schedule of some schemes does not reflect the market value of the lots in the scheme. In some cases, the interest schedule was set according to the whims of the original owner of the scheme and any underlying rationale for the distribution of lot entitlements is not readily apparent. Given this, the Centre does not recommend the continued use of the interest schedule when allocating the assets and liabilities of the body corporate or the proceeds of scheme termination.

Instead, it is recommended that the proceeds of the sale and both the assets and the liabilities of the body corporate should be allocated to lot owners based on the **relative market value** of the lots in the scheme immediately prior to termination. The relative market value is the value of each lot in the scheme as a percentage of the total value of all lots in the scheme.<sup>159</sup> In some schemes, the existing interest schedule will reflect the relative market values of the lots. However, this will not be the case in every scheme.

An allocation using relative market value may require that the body corporate obtain a new valuation of all the lots in the scheme prior to scheme termination. The valuation can then be used to show the value of each lot in the scheme as a percentage of the total market value of all lots in the scheme. To the extent that a valuation is obtained as part of the relevant information and remains current, such a valuation could be used assemble this information.

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<sup>156</sup> BCCM Act s 47(3).

<sup>157</sup> BCCM Act s 46B.

<sup>158</sup> Under the BCCM Act there was no requirement to set the interest schedule according to any principle but on adjustment, the interest schedule was required to be consistent with the market value principle. For a discussion of the history of lot entitlements in Queensland, see Commercial and Property Law Research Centre, Queensland University of Technology, *Queensland Government Property Law Review Issues Paper 2: Lot Entitlements Under the Body Corporate and Community Management Act 1997*, (2013) at 12-14, available at [http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0010/224875/property-law-review-ip2-lot-entitlements-bccm.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0010/224875/property-law-review-ip2-lot-entitlements-bccm.pdf).

<sup>159</sup> The relative market value is different than the market value principle in the BCCM Act in that under the relative market value approach, there is no adjustment for when it is just and equitable that the interest schedule not reflect relative market value. See BCCM Act s 46B.



### Recommendation 25 – Preparing a termination plan

It is recommended that the body corporate may agree by ordinary resolution to appoint a **facilitator** to oversee the preparation and development of a collective sales agreement, redevelopment plan or other proposal to terminate the scheme (each a **termination plan**). Such a plan may be submitted by a person who proposes to acquire the lots in the scheme and developed through a negotiation process with the body corporate.

Once the termination plan is prepared, the facilitator will send a copy of the plan to all lot owners for consideration. At least 120 days after the termination plan has been given to all lot owners, the body corporate may hold a general meeting to vote on the termination plan.

The proceeds of the termination plan and the assets and liabilities of the body corporate will be allocated among the lot owners in proportion to the **relative market value** of each lot immediately prior to termination (the value of the lot expressed as a percentage of the total value of all lots in the scheme).

#### 4.6.6. Prescribed procedure – Step 3 – Approving termination plan

After lot owners have had at least 120 days to review the termination plan, the body corporate may convene an EGM to vote on the termination plan. The body corporate may decide that the plan is incomplete, lacking in detail or in some other respect unacceptable. In this situation, the body corporate may decide to reject the plan outright,<sup>160</sup> or decide to start over, either wholly or partially by returning to step 2. Alternatively, the body corporate may decide to approve the termination plan. This will require a resolution without dissent.<sup>161</sup> If, however, the body corporate obtained or assembled the relevant information and at step 1A the body corporate decided that an economic reason for termination exists, it is recommended that there should be a **reduced threshold** to approve the termination plan.

At schemes where there is a demonstrated economic reason for termination, as agreed by the majority of lot owners (as described at step 1A above), the approval of the termination plan should require the support of at least 75% of lot owners (based on one vote per lot).<sup>162</sup> All lot owners, including any that owe a body corporate debt,<sup>163</sup> will have the right to vote on whether to approve the termination plan regardless of whether the plan requires a resolution without dissent or a reduced threshold to be approved.

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<sup>160</sup> But this will trigger a right of the body corporate or a lot owner to apply to the District Court as discussed at 4.6.7 below.

<sup>161</sup> Subject to any final recommendations relating to a resolution without dissent, as discussed at footnote 141 above.

<sup>162</sup> The Options Paper considered using a super resolution (based on the number of votes cast, not the number of lots in the scheme) for scheme termination. However, it is felt that a threshold based on the number of votes casts rather than the number of lots does not provide sufficient protection for individual property rights.

<sup>163</sup> Lot owners who owe a body corporate debt forfeit their right to vote except for matters that require a resolution without dissent: Standard Module s 84(2); Accommodation Module s 82(2); Commercial Module s 51(2); Small Schemes Module s 45(2). Lot owners who owe a body corporate debt will not forfeit the right to vote for a resolution to approve a termination plan, even if a reduced threshold is required.

After the termination plan is approved by the body corporate (regardless of whether the plan was approved by a resolution without dissent or by the reduced threshold) there may be **dissenting owners**. They may include lot owners who voted against, or did not vote in favour of, the termination plan. They may also include a lot owner who voted in favour of the termination plan but has since changed their mind. When a lot owner changes their mind after the resolution is recorded, the resolution will stand but the lot owner will still have the right to apply to the District Court as a dissenting owner.

If the termination plan is approved by the body corporate, the body corporate will be required to notify specified parties including: all lot owners; the Titles Registry; mortgagees;<sup>164</sup> lessees; and any other parties who hold an interest in the lots or the scheme. This notice to lot owners will be on a prescribed form and will set out for lot owners their obligations under the termination plan and detail the right to challenge the decision in the District Court. The notice to lot owners will also specify that if a lot owner does not take action to challenge the implementation of the termination plan within 120 days, that lot owner will be deemed to be in agreement with the plan.

The notice to the Registrar of Titles will also be on a prescribed form. Upon receiving the notice, from (or on behalf of) the body corporate, the Registrar will be required to make a notation that a termination plan has been approved (in the form of an administrative advice on the title of each lot in the scheme).

The termination plan will be binding on all lot owners, including dissenting lot owners, subject to a right to apply to the District Court to challenge the termination plan. This means that any dissenting owners will have a choice to make. The first is to sell their lot to the developer, that is, agree to the termination plan, recognising that this is what the large majority of lot owners in the scheme have decided. The second option is to apply to the District Court to challenge the termination plan (as discussed at Recommendation 27). The District Court will have the discretion (subject to Recommendation 28 below) to decide whether the termination plan will proceed or not.

It is recommended that if the dissenting owner has not brought application in the District Court against the termination plan within 120 days after being given notice that the termination plan was approved by the body corporate, that the dissenting owner should be deemed to be in agreement with the termination plan.

If the resolution without dissent or (where applicable) the reduced threshold cannot be achieved, the body corporate or any lot owner in the scheme will have the option to apply to the District Court<sup>165</sup> to approve the termination plan under step 4. It is recommended<sup>166</sup> that a lot owner or a body corporate should not apply to the District Court to approve a termination plan unless that plan has been voted on by the body corporate. The District Court will then (subject to these Recommendations)<sup>167</sup> have the jurisdiction to make an order giving effect to the termination plan.

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<sup>164</sup> To the extent this information has been provided to the body corporate. See Recommendation 15, above.

<sup>165</sup> See Recommendation 27, below.

<sup>166</sup> At Recommendation 22, above.

<sup>167</sup> Subject to recommendations relating to the meaning of 'just and equitable' discussed paragraph 4.7 below.

#### **Recommendation 26 – Approving a termination plan**

A termination plan that has been given to lot owners for at least 120 days may be approved by the body corporate in a general meeting by a resolution without dissent. Alternatively, if the relevant information discloses an economic reason for the proposed termination (as agreed by a majority of lot owners), the termination plan may be approved by the body corporate in a general meeting with the support of the owners of at least 75% of the lots in the scheme.

Where the termination plan is approved by the body corporate, the body corporate must give all lot owners notice in the prescribed form stating that the termination plan has been approved and setting out the lot owner's obligations under the termination plan and the right to challenge the decision in the District Court.

**Dissenting owners** may apply to the District Court to decide whether or not the termination plan should proceed if that application is made within 120 days after the lot owner has been given notice in the prescribed form that the body corporate has approved the termination plan.

#### **4.6.7. Prescribed procedure – Step 4: Application to District Court**

At schemes where there are no dissenting lot owners, or where any dissenting owners decide to comply with the termination plan after it is approved, step 4 is not necessary. The scheme may progress directly to step 5.

Where there are dissenting owners, the parties should first try to reach agreement amongst themselves by engaging in the process of preparing the termination plan or through stating the reasons for their opposition with the termination plan administrator and other lot owners. Where the parties are unable to resolve the dispute, an application to the District Court will be available.

As discussed above,<sup>168</sup> the court ordered sale of co-owned property is not unusual in Australia. Such sale is different from compulsory acquisition of private property by the Crown or a government body for public purposes, something that is also not unusual in Australia. However, forced sale of private property from one private person to another private entity does not generally occur in Australia.<sup>169</sup>

In the body corporate scenario, however, co-owned property is attached to, and inseparable from individually owned private property.<sup>170</sup> It is impossible for the District Court to order the sale of the co-owned common property without also ordering a sale of the lot.

In the context of co-owned common property, the right of a lot owner to refuse to sell their lot (and their share of the common property) must be considered in the context of rights of the other lot owners (as co-owners of the common property) to deal with their lots. Balancing the competing rights of individuals is not always an easy task. Where the parties are unable to reach agreement between

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<sup>168</sup> At paragraph 4.2.

<sup>169</sup> See Melissa Pocock, Holdouts, site amalgamations and renewal of urban areas: a call for legislative reform, Paper presented at 18<sup>th</sup> Annual PRRES Conference, Adelaide, Australia 15-18 January 2012.

<sup>170</sup> BCCM Act s 35(3).

themselves as to the correct balance of rights, the District Court will be able to make binding orders on the parties.

Under these Recommendations, there are two ways that an application may be brought before the District Court to decide whether or not it is just and equitable to give effect to a termination plan by a lot owner or the body corporate. The first is if the resolution<sup>171</sup> to adopt the termination plan has not been approved by the body corporate. In this case, a lot owner or the body corporate may bring an application to the District Court seeking the implementation of the plan. The second is if the resolution to adopt the termination plan is approved by the body corporate. In this case, a dissenting owner may bring an application to the District Court seeking that the plan not be implemented.

In both cases, the District Court will be able to make an order giving effect to a termination plan only where satisfied that the termination plan is just and equitable. The District Court will have the authority to make ancillary orders as considered necessary to give effect to the termination plan. As discussed at Recommendation 27, there will be a number of factors for the District Court to consider when deciding whether a termination plan is just and equitable.

#### **4.6.7.1. Termination plan has not been approved by the body corporate**

If the body corporate does not approve the termination plan, the body corporate or a lot owner may make an application in the District Court to order the implementation of the termination plan. The applicant will have the onus of demonstrating to the District Court that the termination plan is just and equitable. This is effectively the provision that currently exists in the BCCM Act except that under these Recommendations the applicant must have attempted to have the termination plan approved by the body corporate prior to bringing an application in the District Court.

#### **4.6.7.2. Termination plan has been approved by the body corporate**

Dissenting lot owners will have the right to apply to the District Court to protect their rights and interests in their lot and the scheme when a termination plan is approved by the body corporate. A dissenting lot owner may be holding out for any number of reasons. The dissenting owner may have lived in the lot for a long time and have sentimental attachment to their home. Perhaps the dissenting owner will not be able to afford an equivalent lot in the same location due to changes in property values or the characteristics of the neighbourhood. The dissenting owner may not want to go through the trouble of moving. The dissenting owner may also be holding out in order to maximise the amount they are paid for their lot. They may be unhappy with the scheme valuation obtained as part of the relevant information.

The dissenting owners will include any lot owner who does not vote in favour of the termination plan and lot owners who may have supported the termination plan but have since changed their mind.<sup>172</sup>

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<sup>171</sup> Regardless of whether the termination plan requires approval by a resolution without dissent or the reduced threshold.

<sup>172</sup> It is recommended that once the resolution has been recorded, a lot owner may not rescind its vote for that resolution, but that lot owner may be treated as a dissenting owner if they subsequently change their mind. Contrast this with NSW, which allows a supporting lot owner to change their mind up until the time the

The dissenting lot owner will have up 120 days after receiving notice of the approval of the termination plan to lodge an application with the District Court. After this time, the dissenting lot owner will be deemed to be in agreement with the termination plan.

On application by a dissenting lot owner, the District Court will determine whether or not to give effect to the termination plan. If satisfied that the termination plan is just and equitable (subject to the recommendations below), the District Court will have the authority give effect to the termination plan and to make such ancillary orders as it considers necessary to achieve this.

When a dissenting owner makes application to the District Court objecting to the termination plan, the onus will shift to the body corporate to demonstrate to the District Court that the termination plan is just and equitable. The onus shifting is justified because the body corporate is seeking to interfere with the dissenting lot owner's property. The District Court may consider the relevant information (if any) in coming to its determination as well as any information provided by the dissenting owner.

If a dissenting lot owner does not take action during the 120 day period, that lot owner will be deemed to have agreed to the termination plan. A situation may arise where a dissenting lot owner has not dissented during the 120 day period but later refuses to comply with the termination plan. In these circumstances, the administrator of the termination plan may need to take steps against the lot owner to enforce compliance with the termination plan. The administrator will be authorised to apply to the District Court to seek an order enforcing the termination plan after the 120 day period has ended. The District Court will have the authority to consider whether the lot owner's opposition to and refusal to comply with the termination plan is reasonable in the circumstances and to make orders as necessary to require the dissenting lot owners to comply with the termination plan.

The costs of applying to the District Court may be high. The Centre recommends that the District Court have discretion to order the body corporate to pay the dissenting lot owner's reasonable court costs if the dissent is reasonable. However, if the dissent is unreasonable or vexatious, the District Court should also be able to order the dissenting lot owner to pay the body corporate's reasonable legal costs.

As an extra layer of protection, these Recommendations also include guidance for the District Court when coming to a determination about whether a termination plan is just and equitable in the circumstances. This is discussed further at paragraph 4.7 below.

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registrar of titles is given notice that the required level of support has been obtained: *Strata Schemes Development Act 2015* (NSW) s 175.

#### **4.6.8. Prescribed Procedure – Step 5: Implementation**

After the termination plan is approved by the body corporate, notice must be given to specified parties, including all lot owners in a prescribed form that will list the lot owner's obligations under the termination plan and details of the right to apply to the District Court. Dissenting owners will have 120 days to bring an action in the District Court opposing the approval of the termination plan. It is recommended that any dissenting owners that choose not to exercise their right to object during the 120 day period should be deemed to have agreed to the termination plan.

If, after 120 days, no owner has brought an application in the District Court, the body corporate may take steps to implement the termination plan. At this time, the administrator of the termination plan will begin to take the necessary steps to see the plan is completed.

If there is a dissenting lot owner who has not brought an application during the 120 day period, the administrator may be required to take steps to force that lot owner to comply with the termination plan. For this reason, at any time that is at least 120 days after lot owners have been given notice that a termination plan has been approved, the administrator may bring an application in the District Court for orders requiring a dissenting lot owner to take the steps necessary to give effect to the termination plan. At this stage after the 120 day period has expired, the District Court will have the ability to consider whether in all the circumstances, the dissenting lot owner's opposition to the plan and failure to comply is reasonable. The District Court will then have the discretion to make the orders necessary to give effect to the termination plan, even to the extent of ordering a trustee be appointed to sell the dissenting lot owner's property.

By the time step 5 commences, it is likely that the rights of any remaining parties that hold an interest in a lot in the scheme or scheme land will have been resolved. To the extent such issues have not been resolved, for example in the case of lessees under a long term commercial lease, those parties will have the usual legal redress for early or forced termination of their interest.

Under step 5, any conditions in the termination plan will be fulfilled. The administrator of the termination plan will assist lot owners to make arrangements to transfer their lots to the developer, to give vacant possession and to receive settlement. The administrator may also take other steps to arrange the sale and transfer of the lots in the scheme as necessary to implement the termination plan.

#### **4.6.9. Prescribed Procedure – Step 6 – Scheme termination**

Once all conditions in the termination plan are satisfied, the title to all lots in the scheme will be vested in one owner. It is only at this point that the scheme will be terminated and the title to all the lots and common property cancelled and replaced with a single lot. There will be only one owner<sup>173</sup> of the newly created lot when the scheme is terminated.

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<sup>173</sup> As indicated above, the developer may be one or more people or one or more companies.

### **Recommendation 27 – Application to the District Court**

On application by a lot owner or the body corporate of a scheme to the District Court for an order giving effect to a termination plan that has not been approved by the body corporate:

- the District Court will make a determination as to whether to give effect to the termination plan or not;
- the District Court must be satisfied that the termination plan is just and equitable; and
- the onus to satisfy the District Court that the termination plan is just and equitable will be on the applicant.

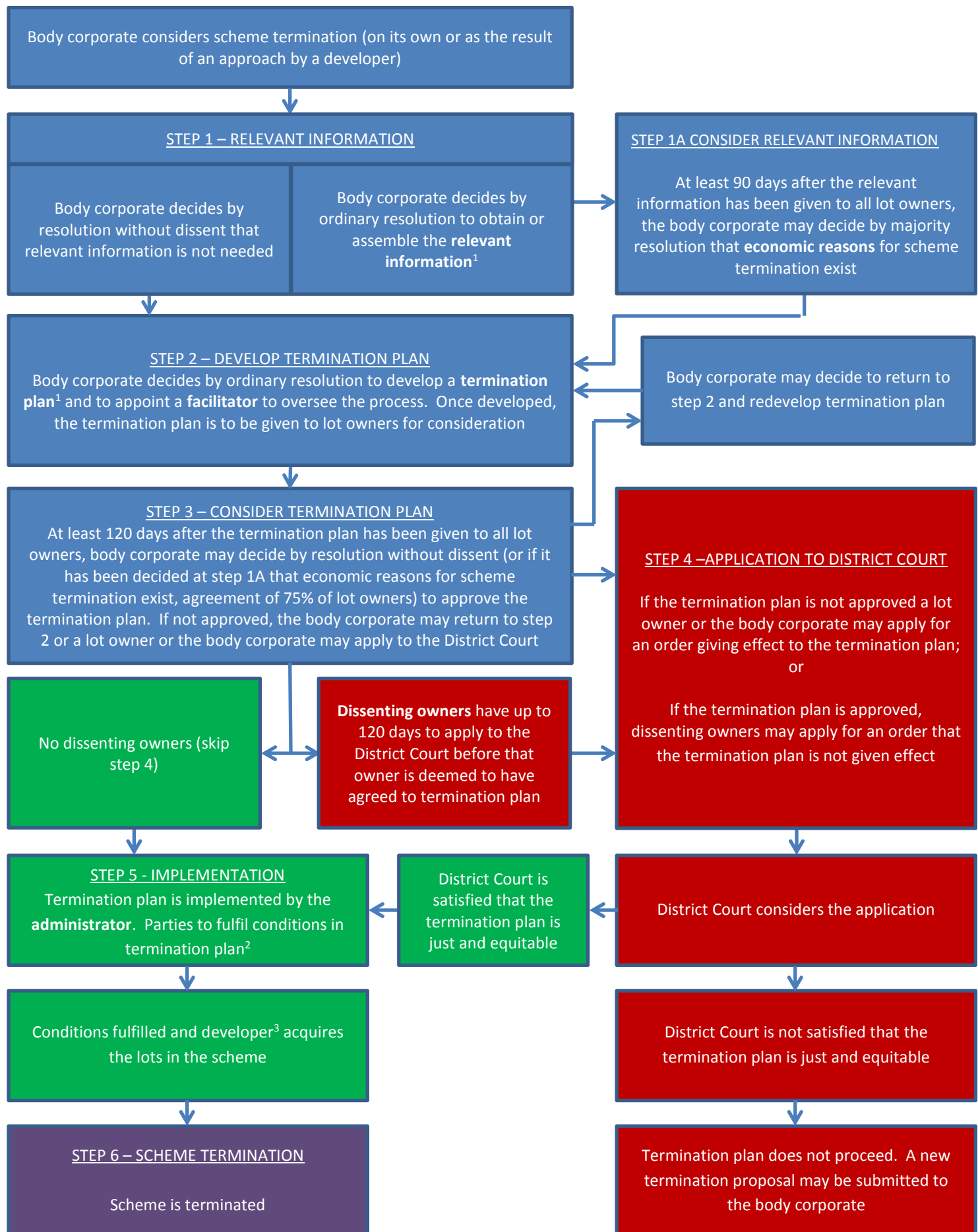
On application by a dissenting lot owner against a termination plan approved by the body corporate (if the application is brought within 120 days after the lot owner has been given notice in the prescribed form):

- the District Court will make a determination as to whether to give effect to the termination plan or not;
- the District Court must be satisfied that the termination plan is just and equitable; and
- the onus to satisfy the District Court that the termination plan is just and equitable will be on the body corporate.

After the 120 day period has expired, the administrator of the termination plan approved by the body corporate may bring an action in the District Court requiring a lot owner to comply with the termination plan. On such application the District Court will determine whether the dissenting lot owner's opposition and failure to comply with the termination plan is reasonable in the circumstances and make orders accordingly.

In all circumstances, the District Court will retain the discretion to make an order about costs as the court sees fit.

**Figure 1 – Scheme Termination Flowchart**



1 – A spending limit may apply. See applicable Regulation Module.

2 – If the administrator brings an application to force a lot owner to comply with the termination plan after the 120 day objection period has passed, the District Court will consider whether the dissenting owner's opposition to the termination plan is reasonable and may give directions to implement the termination plan

3 – The entity acquiring the lots for termination may not be a developer and may be an entity, a person or persons.



## 4.7. When will it be just and equitable to terminate a scheme?

### Options Paper Question 27

**What factors should the District Court consider when deciding whether it is just and equitable to order the termination of a scheme?**

The Options Paper<sup>174</sup> considered whether there should be some legislative guidance for the District Court to determine whether it is just and equitable in the circumstances to order the termination of a scheme. The Options Paper suggested a number of considerations that may be relevant such as the reason for the termination; the consequences of terminating or not terminating the scheme and the expected expenditure at the scheme.

The following factors are examples of the types of considerations that may be relevant:

- the economic need for the proposal (whether the building is uneconomic to maintain or whether the redevelopment potential of the land is high but the building is otherwise sound);
- the consequences to lot owners if the scheme is terminated;
- the consequences to lot owners if the scheme is not terminated;
- the age of the building;
- sinking fund forecasts and current balance; and
- expected capital expenditure required at the scheme.

Many submissions supported these as relevant factors. Other factors that were suggested include: the reasonableness of the arguments against termination; the costs of repairing versus maintaining the building; the condition, age and safety of the building (does it comply with occupation health and safety standards?); the benefit to the local community; and town planning considerations (just to list a few).

Some submissions suggested purely objective factors such as the risks and benefits or the economics of repairing versus replacing the building. Others suggested subjective factors such as: the ability of the dissenting lot owners to purchase similar accommodation; capital gains tax; the age of the residents in the building; and the difficulty of moving.

Given the diversity of schemes in Queensland, it is likely to be impossible to prescribe a complete list of the factors that the District Court may consider. However, there are a number of factors, which, as a minimum, should be considered by the Court.

Some of these factors will be covered in the relevant information produced under Recommendation 23. To the extent that the relevant information has been produced, the Court should have reference to it when deciding whether a termination plan is just and equitable.

The District Court may also be required to consider whether the compensation paid to dissenting lot owners is at or above market value. This will likely involve considering the amount of compensation

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<sup>174</sup> Options Paper, p 55 at 4.3.4.1.

being offered, the market value of the scheme as a whole at its highest and best use and the aggregate market value of the individual lots in the scheme.

The District Court should also consider the economic reasons for the termination plan and the consequences to lot owners if the scheme is terminated or not terminated. This may include the economic consequences, such as whether a dissenting owner is receiving at least market value for their lot, the costs of moving, the amount each lot owner would be required to pay to repair or maintain the building. It may also include social or emotional consequences such as whether there is suitable alternative housing available.

#### **Recommendation 28 – Determining ‘just and equitable’**

The District Court should have reference to the following factors when determining whether a termination plan is just and equitable:

- any structural engineer’s report, quantity surveyor’s report or valuation prepared for the purposes of scheme termination at the scheme;
- any termination plan, collective sales agreement or redevelopment plan prepared by the person proposing the termination;
- the economic reasons for the termination plan;
- the consequences to lot owners (both individually and as a whole) if the scheme is terminated;
- the consequences to lot owners (both individually and as a whole) if the scheme is not terminated;
- the age and condition of the building or any structures on scheme land;
- sinking fund forecasts and current balance;
- the aggregate market value of individual lots compared to the market value of the scheme as a whole in its highest and best use;
- any other factor specified in the relevant Regulation Module; and
- any other factor the Court decides is relevant.

## **4.8. Termination of layers in layered schemes**

### **Options Paper Questions 28-29**

**Should it be possible to terminate schemes that are part of a layered scheme without terminating all layers? What is the best way to achieve this?**

**What safeguards would need to be put in place if the threshold for scheme termination is reduced?**

Currently, a scheme can only be terminated if it is a basic scheme.<sup>175</sup> For layered schemes, this may mean terminating every subsidiary layer and then terminating the principal body corporate.

<sup>175</sup> BCCM Act s 77 and s 10(5) (definition of ‘basic scheme’).

Only 21 submissions addressed the question relating to whether it should be possible to terminate a layer in a layered scheme without terminating every layer. Of these, 16 were in favour of this while four submissions argued that it will depend on the circumstances of the scheme.

Notably, the Registrar of Titles submitted that it may be possible to create a simplified process to unwind or unbundle a layered arrangement of schemes that would, in appropriate circumstances, allow the termination of a community titles scheme without termination of the lots in the community titles scheme.

Such an unbundling process would have to be subject to appropriate safeguards for the lot owners in the subsidiary schemes. As a minimum, the process would have to be subject to appropriate body corporate resolutions and delivered in a way that no interests are adversely affected.

#### **Recommendation 29 – Terminating layers of layered schemes**

The Department of Justice and Attorney-General should investigate the feasibility of developing a simplified process to allow termination of a community titles scheme without terminating the lots in the scheme.

Such a process would be exercised in appropriate circumstances with the support of the lot owners in the relevant schemes.

## 5. Conclusion

Community title living in Queensland is steadily increasing. Between March 2014 and March 2015, the number of community titles schemes in Queensland increased by more than 1100 schemes, representing thousands of new lots.<sup>176</sup> Between March 2015 and December 2016, another 2,225 schemes were registered.<sup>177</sup> As the number of people living in community titles schemes increases, the need for the types of reforms recommended in this paper will continue to become apparent.

The Recommendations contained in this paper are designed to improve the ability of the body corporate to enforce decisions that are supported by a large majority of the members of the body corporate even where this involves prohibiting particular types of behaviour. The Recommendations are designed to give the body corporate certainty that it will be able to recover unpaid contributions, penalty interest and recovery costs from defaulting lot owners even if the lot owner is located overseas. The Recommendations are also designed to provide a means to allow for the renewal of ageing community titles schemes while providing protection for those dissenting lot owners who may not agree with the view of the majority.

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<sup>176</sup> As at March 2014, there were 42,948 schemes in Queensland: Queensland Government, Department of Justice and Attorney-General, Office of Body Corporate and Community Management Commissioner, *Common Ground*, Issue 12, 2. As at March 2015, there were 44,110 schemes in Queensland: Queensland Registrar of Titles: Information provided by the Office of the Registrar of Titles, Department of Natural Resources and Mines, Queensland as at 29 March 2015.

<sup>177</sup> As at December 2016, there were 46,335 schemes in Queensland: Queensland Registrar of Titles: Information provided by the Office of the Registrar of Titles, Department of Natural Resources and Mines, Queensland as at December 2016.